RECORD, CASE No. 14,238.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 230.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

B. D. ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants in Error. } No. 4978.

Be it remembered that on the 16th day of January, 1888, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a case made from the district court of Labette county attached thereto and made a part thereof; which said petition in error and case made are in words and figures as follows, to wit:

2 In the Supreme Court of the State of Kansas.

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants in Error. } 4978.

Petition in Error.

Said plaintiff in error complains of said defendants in error, and for cause thereof alleges that heretofore, to wit, on the 2nd day of November, 1887, in an action then pending in the district court of Labette county, Kansas, wherein this plaintiff in error was plaintiff and said defendants in error were defendants, by the consideration of said court said defendants recovered a judgment against said plaintiff for the sum of $19.30, costs, as will more fully appear by the "case made," which is hereto attached and made part hereof.

And plaintiff alleges that there was error committed by said court in said proceedings and judgment, which appears of record and is shown by said "case made," in this, viz:

1st. Said court erred in finding, under the evidence introduced, the issues in favor of the defendants instead of in favor of the plaintiff.

2nd. Said court erred in rendering judgment in favor of the defendants, when it should have been rendered in favor of the plaintiff on the agreed facts.

Wherefore said plaintiff prays that said judgment so as aforesaid rendered by said district court may be reversed, vacated, and set aside, and that this court render judgment on the pleadings and agreed statement of facts in favor of plaintiff, as in his petition prayed for, and for costs herein.

CASE & GLASSE,
Attys for Plaintiff in Error.

Filed January 16, 1888.

C. J. BROWN,
Clerk Supreme Court.

3 In the District Court for Labette County, Kansas.

B. D. ROBERTS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY and THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Defendants.

Case Made.

This case was tried upon the petition of plaintiff, the answer of defendants, and the reply of plaintiff by the court without a jury, and upon the trial the agreed statement of facts contained in the written stipulation signed by the attorneys of the respective parties hereto was read in evidence and was the only evidence offered or considered in the case.

Upon the said pleadings and the said evidence the court found generally in favor of the defendants and against plaintiff, and rendered its judgment in accordance therewith and caused the same to be entered of record; to all of which plaintiff duly excepted.

Certified copies of said pleadings and stipulation, all on file in this case, and of the record of said judgment are attached hereto and are hereby made a part of this case made.

In the District Court for Labette County, Kansas.

B. D. ROBERTS, Plaintiff,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Petition.

Said plaintiff alleges that said defendant, The Missouri, Kansas and Texas Railway Company, is a corporation duly organized and acting under the laws of the State of Kansas; that said defendant, The Missouri Pacific Railway Company, is a corporation duly organized and acting under the laws of the State of Missouri and as such authorized to transact business in Kansas; that said defendant, The Missouri, Kansas and Texas Railway Company, is the owner of a line of railroad running the entire length of Labette county from north to south, and passing over in a nearly north-and-south direction the entire length of the east half of the northwest quarter and in the same direction over nearly the entire length of the northeast quarter of the southwest quarter, both tracts in section sixteen, township thirty-four, range twenty-one, in Labette county, Kansas, which line of railroad is leased to and operated by said defendant, The Missouri Pacific Railway Company. Plaintiff alleges that he is the owner in fee and entitled to the immediate possession of the entire N. E. ¼ of S. W. ¼ and E. ½ of N. W. ¼ of sec. 16, T. 34, R. 21, in Labette county, Kansas, through which said line of railroad runs as aforesaid; that said defendants wrongfully, forcibly, and illegally keep said plaintiff out of the possession of and occupy themselves a

strip of said land one hundred feet in width, being fifty feet wide on each side of the center of the track of said railroad above described, said strip one hundred feet wide through said land being occupied by said defendants as a road-bed and right of way for said railroad, without any right or authority so to do; that neither said
4 defendants jointly nor either of them separately has any legal right or claim to said real estate or any part thereof, nor have they or either of them any equity therein, and yet they both deny plaintiff's right thereto.

Wherefore plaintiff prays the judgment of this court adjuging that he is the legal and equitable owner of the whole of said real estate and entitled to the possession thereof, and dispossessing and ejecting said defendants and each of them therefrom, and that he recover his costs herein.

CASE AND GLASSE,
Attorneys for Plaintiff.

Said petition being endorsed as follows:
No. 3146. B. D. Roberts *vs.* M., K. & T. R'y Co. & Mo. Pac. R'y Co. Petition. Filed December 15, 1885. E. B. Baldwin, clerk dist. court. Case and Glasse, att'ys for plaintiff.

In the District Court of Labette County, Kansas.

B. D. ROBERTS, Plaintiff,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Answer.

First defense. The defendants deny that the plaintiff has any estate, legal or equitable, in the premises demanded in his petition or is entitled to the possession thereof.

Second defense and counter-claim. The defendant The Missouri, Kansas and Texas Railway Company, under the name of the Union Pacific Railway Company, Southern branch, was, on the 28th day of September, A. D. 1865, duly incorporated under the act entitled "An act to provide for the incorporation and regulation of railroad companies," approved February 13th, A. D. 1865, by section ten (10) of which act said defendant was authorized to enter upon any lands belonging to the State of Kansas and to appropriate thereof as much as it might deem necessary for its railroad. By the act entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State and to apply the same to the construction of such roads and telegraphs," approved February 9th, A. D. 1864, a right of way upon and across all lands belonging to the State of Kansas to a distance of one hundred feet in width was granted by the State of Kansas to the Atchison, Topeka and Santa Fé Railroad Company for a branch railroad from where the main line of said company crosses the Neosho river down the Ne-

osho valley to the point where the Leavenworth, Lawrence and Fort Gibson railroad enters said Neosho valley. By an indenture made and executed on the 19th day of March, A. D. 1866, the said Atchison, Topeka and Santa Fé Railroad Company transferred and assigned to the said defendant, The Missouri, Kansas and Texas Railway Company, under the name of the Union Pacific Railway Company, Southern branch, all the rights, title, interest, authority, privileges, immunities, and liberties held, acquired, possessed, and enjoyed for maintaining and operating and enjoying said branch railroad, which transfer and assignment was duly ratified and confirmed by the resolution of the State of Kansas approved February 26th, 1867, under which transfer and
5 assignment so ratified and confirmed said branch railroad was by said defendant built and constructed prior to the 6th day of June, A. D. 1870, and has at all times since then been run and operated by it. The line of said defendant's railroad was definitely located upon the premises in plaintiff's petition demanded on the 8th day of January, A. D. 1868, and the said railroad was built and constructed thereon prior to the 6th day of June, A. D. 1870, and the said defendant has at all times since then been in the quiet, peaceable, uninterrupted, and exclusive possession of said premises. By the joint resolution of Congress approved April 10th, A. D. 1869, entitled "A resolution enabling *bona fide* settlers to purchase certain lands acquired from the Great and Little Osage tribes of Indians," the section of land in plaintiff's petition described was granted by the United States to the State of Kansas, subject to the right of way of said defendant's railway hereinafter set forth.

By the act entitled "An act in relation to the Missouri, Kansas and Texas Railway Company, late Union Pacific Railway Company, Southern branch," approved March 2nd, A. D. 1871, it was enacted that the defendant The Missouri, Kansas and Texas Railway Company in constructing, extending, and operating its road should have, possess, and enjoy and be vested with the same rights, privileges, powers, and immunities over its whole line that it then had and enjoyed over any part or portion thereof by virtue of any laws of Kansas, whereby the grant of a right of way over all lands belonging to the State of Kansas made by the act of February 9th, 1864, aforesaid was extended to the whole line of said defendant's railway.

Said act of March 2nd, 1871, took effect upon the 23rd day of March, A. D. 1871, and at that time the State of Kansas had not parted with its right, title, or interest in and to the land in plaintiff's petition described or any part thereof. The land in plaintiff's petition described is a part of the lands reserved to and for the Great and Little Osage tribes of Indians by the treaty between the United States and the Great and Little Osage tribes aforesaid proclaimed December 30th, A. D. 1825, and sold to the United States by virtue of the first and second articles of the treaty between the United States and the Great and Little Osage tribes of Indians proclaimed January 21, A. D. 1867. The defendant The Missouri, Kansas and Texas Railway Company is the company referred to under the name of the Union Pacific Railway Company, Southern branch, in the

act of Congress entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved July 26th, 1866.

The acceptance of the terms, conditions, and impositions of said act by the said defendant was duly signified in writing, under the corporate seal of said defendant, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was within one year after the passage of said act duly made and deposited with the Secretary of the Interior.

On the 8th day of January, A. D. 1868, the said defendant filed with the Secretary of the Interior maps of its line, designating the route thereof and definitely locating the same upon the premises in plaintiff's petition demanded, and its railroad was built and constructed thereon prior to the 6th day of June, A. D. 1870. Under the said act of Congress approved July 26th, A. D. 1866, the defendant The Missouri, Kansas and Texas Railway Company is the owner in fee simple of and the defendants, The Missouri, Kansas and Texas Railway Company and The Missouri Pacific Rail-
6 way Company, are in the actual possession of a right of way to the extent of one hundred feet on each side of the said railway through the lands in plaintiff's petition described. The plaintiff claims an estate or interest therein adverse to the defendants' rights.

The defendants therefore pray that the plaintiff may be compelled to show his said interest, and that the same may be adjudged null and void and the defendants' title quieted against the same, and that the plaintiff be forever enjoined from the further prosecution of this action.

Third defense. The cause of action in the plaintiff's petition set forth did not accrue within fifteen years next before the commencement of this action.

DAVID KELSO,
Att'y for Defendants.

Said answer being endorsed as follows:

B. D. Roberts *vs.* M., K. and T. and Mo. P. R'y Co. Answer. No. 3146. Filed Jan'y 14, 1886. E. B. Baldwin, clerk dist. court. David Kelso, attorney for defendants.

In District Court for Labette County, Kansas.

B. D. ROBERTS, Plaintiff,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Reply.

Said plaintiff for his reply to the answer of said defendants and to each count thereof denies each and every material allegation

therein contained which are inconsistent with the allegations of plaintiff's petition.

CASE AND GLASSE,
Att'ys for Plaintiff.

Said reply being endorsed as follows:
No. 3146. B. D. Roberts *vs.* M., K. & T. & M. W. R'y Co. Reply. Filed Jan'y 23. E. B. Baldwin, clerk dist. court.

STATE OF KANSAS, }
County of Labette, } *ss*:

In Labette County District Court.

B. D. ROBERTS, Plaintiff, }
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants. }

Stipulation.

It is hereby stipulated and agreed that upon the trial of the above-entitled case the following facts shall be admitted.

1. The Union Pacific Railway Company, Southern branch, was, on the 25th day of September, 1865, duly organized and incorporated under the act of the legislature of the State of Kansas entitled "An act to provide for the incorporation and regulation of railroad companies," approved February 13th, 1865, and on the 3rd day of February, 1870, its name was duly changed and made the Missouri, Kansas and Texas Railway Company, under which name it is one of the defendants herein.

2nd. By an indenture made and executed on the 19th day
7 of March, 1866, the Atchison, Topeka and Santa Fé Railroad Company transferred and assigned to said defendant all its rights, titles, authorities, privileges, immunities, and liabilities held, acquired, possessed, and enjoyed by it for maintaining, operating, and enjoying a branch railroad as alleged in the answer filed herein, which branch railroad was by said defendant built and constructed prior to the 6th day of June, 1870, and has at all times since been owned and operated by it and its lessees.

3. The State of Kansas did not part with any of its rights, title, or interest to the premises demanded in plaintiff's petition herein until the 26th day of May, 1871.

4th. The land in plaintiff's petition described is a part of the Osage ceded lands, as alleged in the answer filed herein.

5th. The defendant The Missouri, Kansas and Texas Railway Company is the same company referred to under that name and under the name of the Union Pacific Railway Company, Southern branch, in the acts and resolutions of the Congress of the United States and of the legislature of the State of Kansas referred to in the answer filed herein.

6th. The acceptance of the terms, conditions, and impositions of the act of Congress approved July 26th, 1866, was, as alleged in

said answer, duly signified in writing by said defendant, with the corporate seal of said defendant, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was within one year after the passage of said act duly made and deposited with the Secretary of the Interior.

7th. On or about the 6th day of June, 1870, said defendant, The Missouri, Kansas and Texas Railway Company, located, built, and constructed its railroad upon, over, and across the lands described in plaintiff's petition and operated said road down to December 1st, 1880, when it leased said road to said defendant, The Missouri Pacific Railway Company, which said last-named company from the date last mentioned has operated said road down to the present time and is now operating the same, and during all the time from the construction of said road down to the present time said defendants have been in the quiet, peaceable, uninterrupted, and exclusive possession of a strip of land through, over, and across said tract, extending fifty feet on either side from the center of the track or bed of said railroad.

8th. Said lands are what are known as school lands in the State of Kansas, and on said May 25th, 1871, according to and under the provisions of an act of the legislature of the State of Kansas entitled "An act to provide for the sale of school lands," and on presentation of a certificate of the county clerk of said Labette county, Kansas, showing that one J. A. G. Roberts had paid the full amount of the purchase-money and all interest due for the east half of the northwest quarter and the northeast quarter of the southwest quarter of section No. sixteen, in township No. thirty-four south, of range No. twenty-one east, in said county, with a certificate thereon endorsed by the auditor of state, showing that he had charged the county treasurer of said county with the full amount of the purchase-money mentioned in said certificate, the governor of said State, to wit, James M. Harvey, issued a patent to said purchaser, J. A. G. Roberts, his heirs and assigns, for said described lands, which said patent conveyed to said patentee a full title in fee simple to said lands, except as the same may be qualified, as hereinbefore stated, and was duly signed and executed by said Governor James H. Harvey and by W. H. Smallwood, secretary of state of the State of Kansas, and was under the seal of the State of Kansas, and said J. A. G. Roberts thereupon took possession of all said lands, save as specified and excepted in the foregoing stipulation No. 7, and he retained possession thereof, except as specified and excepted
8 in said stipulation No. 7, down to September 7th, 1885, when he sold said land, as stated in the stipulation next following.

9th. On September 7th, 1885, said J. A. G. Roberts and his wife, one Helen A. Roberts, for and in consideration of the sum of $2,000.00 to them in hand paid by this plaintiff, B. D. Roberts, granted, bargained, sold, and conveyed by their good and sufficient deed of conveyance unto B. D. Roberts all said lands last above described, and said B. D. Roberts thereupon took possession of all said lands save as specified and excepted in said stipulation No. 7, and has had possession thereof from that time until the present time

and is now in the possession thereof, save as specified in said 7th stipulation.

10th. Upon the trial of this case the court shall take judicial notice of all treaties, acts, and resolutions of Congress and of the legislature of the State of Kansas referred to in the answer filed herein.

11th. Nothing in this stipulation is to be construed as to waive the right of the defendants or either of them to a strip of two hundred feet in width through the said lands as a right of way if in view of the facts and the law the same shall so appear.

12th. Prior to the 6th day of June, 1870, the defendant The Missouri, Kansas and Texas Railway Company, with the approval of the President of the United States, located its said railroad through the said Osage ceded lands and upon the premises demanded, and built and constructed its said railroad in substantial conformity to the act of Congress approved July 26, 1866.

CASE AND GLASSE,
Att'ys for Plaintiff.
DAVID KELSO,
Att'y for Defendants.

Said stipulation being endorsed as follows:

No. 3146. B. D. Roberts *vs.* M., K. & T. and M. P. R'y Co. In dist. court. Stipulation. Filed May 28, 1886. E. B. Baldwin, clerk dist. court.

Be it remembered that at a regular session of the district court within and for the county of Labette, in the 11th judicial district of the State of Kansas, begun and held at the court-house on the 15th day of February, A. D. 1886, the same being the regular February, A. D. 1886, term of said court—

Present: Hon. Geo. Chandler, judge;
" E. B. Baldwin, clerk;
" C. B. Woodford, sheriff;
" J. D. Conderman, Co. attorney;
" Geo. Gleadhill, reporter—

Among others the following proceedings were had and duly entered of record at page 46 of Journal "K" of the records of said court:

FEBRUARY 25TH, 1886.

B. D. ROBERTS, Plaintiff,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants. } No. 3146.

Now, on this day, this case was called for trial in its regular order on the docket.

The plaintiff appeared by Case and Glasse, his attorneys, and the defendants by D. Kelso, their attorney.

A jury being waived, the trial of the cause was to and by the

court, and, after hearing the evidence and being fully advised in the premises, the court finds for the plaintiff and against the
9 defendants, finding that the allegations of the plaintiff's petition herein are true, and that he is entitled to the possession of the property therein described.

It is therefore by the court considered, ordered, and adjudged that the said plaintiff, B. D. Roberts, have and recover of and from the said defendants, The Missouri, Kansas and Texas Railway Company and The Missouri Pacific Railway Company, the possession of the said property, lands, and tenements described in the said plaintiff's petition herein and the costs in and about this action expended, taxed at $—, for which execution is awarded.

And thereupon came the defendants, by their said attorney, and by notice upon the journal demanded another trial hereof. Upon consideration whereof the court doth order that the judgment above rendered be, and the same is hereby, vacated and set aside and another trial awarded hereof, and that this action stand for trial at the next term of this court.

Be it remembered that at a regular session of the district court within and for the county of Labette, in the 11th judicial district of the State of Kansas, begun and held at the court-house, in the city of Oswego, on the 10th day of October, A. D. 1887, the same being the regular October, A. D. 1887, term of said court—

Present: Hon. Geo. Chandler, judge;
" E. B. Baldwin, clerk;
" C. B. Woodford, sheriff;
" W. F. Blanchard, under sheriff;
" T. C. Cory, county attorney;
" Geo. Gledhill, reporter—

Among others the following proceedings were had and directed to be entered of record:

B. D. Roberts, Plaintiff,
vs.
The Missouri Pacific Railway Company and The Missouri, Kansas and Texas Railway Company, Defendants. } No. 3146.

Now, on this 2nd day of November, A. D. 1887, this case being called for trial, the plaintiff appeared by Case and Glasse, his attorneys, and the defendants appeared by David Kelso, their attorney.

Thereupon said case was submitted to the court upon the issues herein joined; upon consideration whereof the court finds in favor of the defendants and against the plaintiff, finding the issues joined in this action in favor of the defendants and against the plaintiff.

Therefore it is by the court considered, ordered, and adjudged that said defendants, The Missouri Pacific Railway Company and The Missouri, Kansas and Texas Railway Company, have and recover of and from plaintiff, B. D. Roberts, their costs herein expended, taxed at $19.30, for which execution is awarded.

To which finding and decision of the court the plaintiff duly ex-

cepted and excepts, and thereupon he is given thirty days in which to make and serve a case for the supreme court, and defendants are given ten days in which to suggest amendments thereto, said case to be presented to the judge for settlement within ten days thereafter.

10 STATE OF KANSAS,)
Labette County,) ss:

I, E. B. Baldwin, clerk of the district court within and for the aforesaid county and State, do hereby certify that the above and foregoing are true and correct copies of the petition, answer, reply, stipulation, the order of the court upon the first trial of this cause, and the order and judgment of the court upon the final trial of said cause as the same appear on file and of record in my office, and that the same are a correct and complete transcript of the pleadings and proceedings in said cause as the same appear on file and of record in my office.

Witness my hand and the seal of said court, at Oswego, Kansas, this 1st day of December, A. D. 1887.

[SEAL.] E. B. BALDWIN,
Clerk of the District Court.

I, the undersigned, judge of the eleventh judicial district of the State of Kansas, hereby certify that the above and foregoing "case made" contains true and correct copies of all the pleadings, papers, records, judgment rendered and orders made, and shows all the evidence introduced, objections and rulings made, and exceptions taken in the trial of the case therein entitled, pending in the district court of Labette county, Kansas, wherein B. D. Roberts is plaintiff and The Missouri Pacific Railway Company and The Missouri, Kansas and Texas Railway Company are defendants, as the same has been and is settled and allowed by me, and that the same was served on said defendants within the time given by the court to make and serve same, and the clerk of said court is hereby ordered to attest same under his hand, with the seal of said court attached thereto, and that he file same so attested with the papers in said case.

Witness my hand, at my chambers, in the city of Independence, in Montgomery county, Kansas, this December 13th, 1887.

GEO. CHANDLER, *Judge.*

Attested this 16th day of December, A. D. 1887.

[SEAL.] E. B. BALDWIN,
Clerk Dist. Court.

[Endorsed:] 4978. B. D. Roberts, plaintiff, *vs.* The M., K. and T. and The Mo. Pac. R'y Co's, defendants. Filed December 16th, 1887. E. B. Baldwin, clerk of the dist. court.

I hereby waive the issuance and service of summons herein.

_____,
Attorney for Defendants.

Filed January 16, 1888.

C. J. BROWN,
Clerk Supreme Court.

11 And also on the 16th day of January, 1888, there was filed in the office of the clerk of said court a waiver of the issuance and service of summons in error in the above-entitled cause, which is in words and figures as follows, to wit:

In the Supreme Court of the State of Kansas.

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants in Error.

Waiver of Issue and Service of Summons in Error.

The Missouri, Kansas & Texas Railway Company and The Missouri Pacific Railway Company, defendants in error, hereby waive the issue and service of summons in error in the above-entitled action and enter their appearance therein.

DAVID KELSO,
Attorney — Defendants in Error.

12 And afterwards, on the 1st day of October, 1889, the same being one of the regular judicial days of the July term, 1889, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Hon. William A. Johnston, associate justices, and C. J. Brown, the clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

B. D. ROBERTS, Plaintiff in Error,
vs.
THE M., K. & T. R'L'Y CO. *et al.*, Defendants in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Labette county; and thereupon said cause was submitted on brief of counsel for both parties herein and taken under advisement by the court.

13 And afterwards, on the 11th day of January, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court in session, at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine, and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that the cause be remanded for further proceedings, in accordance with the views of this court as expressed in the written opinion filed herein; it is further ordered that the defendants in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

14 And also on said 11th day of January, 1890, there was filed in the office of the clerk of said court the syllabus and opinion of the court in said cause, which are in words and figures as follows, to wit:

14½ B. D. ROBERTS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY. No. 4978.

Error from Labette county. Reversed.

Syllabus by the Court—Clogston, C.

1. The act of July 26, 1866 (14 U. S. Statutes, 289), gave a right of way over the Osage ceded lands, being lands reserved by the United States for the Great and Little Osage Indians, but such right of way extended over such lands only as had not previously been disposed of by the Government.
2. The third section of the act of admission of the State of Kansas into the Union irrevocably granted to the State for the use of schools the sixteenth and thirty-sixth sections of the public lands, and that grant embraced those sections of Indian lands within the State in which the Indians had a right of possession only.
3. Where a right of way is given to a railroad over certain lands by an act of the legislature and afterwards, and before the location and construction of such railroad, such act is repealed: Held, that such railway company secured no right of way by the construction of its road over such lands after the act granting such right of way was repealed.
4. That chapter 124 of the Session Laws of 1871 is void, being in violation of section 1, article 12, of the Constitution.

14¾ B. D. ROBERTS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY. } 4978.

Error from Labette county.

Statement.

This was an action in ejectment brought by the plaintiff in error against the defendant railway companies, in the district court of Labette county, to recover possession of certain lands occupied by defendant as a right of way through section 16, township 34, range 21, in Labette county. Trial by the court and judgment for the defendants in error. The plaintiff now brings the case here.

15 B. D. ROBERTS
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY. } 4978.

Error from Labette county. Reversed.

Opinion by Clogston, C.

The land in question was originally Osage ceded lands. The plaintiff claimed title by virtue of a patent issued by the State of Kansas to J. A. Roberts and by deed of conveyance from said Roberts to the plaintiff. The defendants claim title, first, by virtue of an act of Congress approved July 26, 1866; and, second, by chapter 79 of the Session Laws of Kansas of 1864 and chapter 44 of the Session Laws of 1865 and chapter 144 of the Session Laws of 1871; and, lastly, by virtue of fifteen years' statute of limitation. It is conceded that the plaintiff is entitled to the possession of this land under his title unless the defendants had a right of way through the land by virtue of the statutes above cited or by their adverse possession of fifteen years; and we will consider these defenses in the order in which they are given.

First. As to the act of Congress under which the defendants claim, being section 1, U. S. Revised Statutes, chap. 270, vol. 14, it is
16 an act granting lands to the State of Kansas in aid of the construction of the southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas, and, after granting to the State certain lands, the alternate sections of lands or parts thereof designated by odd numbers, to the extent of five sections on each side of the road and not exceeding in all ten sections, with certain restrictions thereto as to rights acquired before the location of the road by pre-emption and homestead settlement, etc., or to any land "reserved to the United States for any purpose whatever," then this proviso:

Provided, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal im-

provement or other purpose whatever be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States.

Under this proviso defendants claim a right of way through this land. As said before, this land was Osage ceded land, which was afterwards conveyed to the Government by treaty with the Great and Little tribes of Osage Indians, January 21, 1867. The defendants constructed their road over this land, as shown by the findings, about June 6, 1870. The plaintiff's title from the State bears date of May 25, 1871, and since the construction of the road the defendants have been in possession of the right of way up to this time. The statute above quoted was to give a right of way through lands which the Government had reserved, either by acts of Congress or in any other manner, for the purpose of aiding internal improvements or for any other purpose, and through such lands, and such lands only, it granted to the
17 railway a right of way; and if the land in question falls within the list of lands exempted from the operation of this statute, then the defendants have a right of way so far as this one statute is concerned. This land, being Osage Indian land at the time of the passage of the act of Congress of July 26, 1866, was land reserved by the Government from the operation of that grant. The grant by its terms included all the lands reserved by the United States for any purpose whatsoever. Its broad terms included Indian lands or lands given for their use; and in this particular exception to the act and grant of right of way Congress must have had in mind these Osage lands, for they were lands lying directly in the route of this contemplated road, and so far as Congress could do to aid the State of Kansas in the construction of railroads it was willing to do. This was the object of the statute—to aid in building roads in Kansas. That being its object, the right of way was a very important feature of the aid to be given. In construing the act of the 3d of March, 1863, being an act to grant lands to the State of Kansas to aid in the construction of railroads, the Supreme Court of the United States, in Leavenworth R'Y Co. *vs.* U. S., 92 U. S., 733, said: "All lands heretofore reserved—that is, reserved before the passage of the act—by competent authority, for any purpose whatsoever, are excepted by the proviso." This language is broad and comprehensive. It unquestionably covers these lands that had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved, not to the United States but to the Osage Indians, they are therefore not within the terms of the proviso. This proposition is untenable. It would leave the
18 proviso without effect, because all the reservations through which the road was to pass were Indian. This fact was recognized and the right of way granted through them, subject to the approval of the President. But the verbal criticism that these lands were not, within the meaning of the proviso, reserved "to the United

States" is unsound. The treaty reserved them as much to one as to the other contracting party. Both were interested therein and had title thereto. In one sense they were reserved to the Indians, but in another and broader sense to the United States "for the use of the Indians." Also see Wolcott *vs.* Des Moines Navigation Co., 5 Wall., 631. This proviso construed is exactly the same as the proviso to the act of July 26, 1866, and the subject-matter is the same lands—the Osage ceded lands—and therefore, having once received an interpretation by the Supreme Court of the United States, such interpretation must be followed by this court.

This brings us to the question whether the Government of the United States had, prior to the act of July 26, 1866, disposed of any of these lands, over which a right of way is claimed, to the State of Kansas for school purposes. It is claimed by the plaintiff in error that by the act of admission of the State of Kansas Congress had, by solemn compact with the State, ceded to it the sixteenth and thirty-sixth sections of each township of public lands for school purposes, and that this compact included all the land in the State that belonged to the Government, and that it attached to land in which the Indians had a possessory right as well as to the public lands generally subject to sale and pre-emption. Section 3 of the act of admission, paragraph five, is as follows:

"That sections numbered sixteen and thirty-six, in every
19 township of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise disposed of other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

The right of the United States to dispose of lands to which it holds the fee has ever been recognized by the courts of highest resort in this country, and this rule is true with regard to lands in which the Indians have a right of possession as well as to the public lands belonging to the Government. See Johnson *vs.* McIntosh, 8 Wheat., 543; U. S. *vs.* Cook, 19 Wall., 591; Clark *vs.* Smith, 13 Pet., 195. The only limitation made by this act of admission was that land that had not been sold or otherwise disposed of should be granted to the State for school purposes. Now, these Osage lands were the property of the United States and, as we said before, were subject to grant by the Government. The right and power to dispose of these lands rested with Congress, and it having that power, then they were not otherwise disposed of and were subject to the grant made to the State. This compact was binding upon the Government, and when made and accepted by the State became unalterable, except by consent of the State. By this act the Government parted with these lands, and they were no longer subject to be disposed of for other purposes. They were sacred to Kansas for the use of the public schools. It is true that the Osage Indians had the right of possession, and this right of possession was as secure to them as that of the fee in the Government, and, when transferred to the State, as secure as the interest of the State; but this was a possessory right only and one that might be terminated by the Government at any time, with the consent of the Indians. This the Government did

do, and by treaty with the Great and Little Osage Indians, which was ratified January 21, 1867; and when that was done the
20 right of possession as well as the fee through the Government passed to the State of the sixteenth and thirty-sixth sections. Up to that time it was a float.

Beecher *vs.* Wetherby, 95 U. S., 517. This was an action in replevin, brought by Beecher to recover from Wetherby certain sawlogs cut upon section sixteen, in Wisconsin, and the controversy arose between these parties, one claiming by patent from the State of Wisconsin, the State having sold the land as school land, and the other claiming by patent from the United States. The land, prior to the admission of Wisconsin to the Union, was Indian land, and continued to remain Indian land for some eighteen months after the State was admitted. In the act of admission there was granted to the State of Wisconsin the sixteenth section of each township of public land for schools, and the language is identical with that of the act of admission of Kansas, with the exception that it only included the sixteenth section, while that of Kansas included the thirty-sixth section as well. In other respects they were the same. Speaking of this contract between the Government and the State of Wisconsin, the court said:

It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen in every township of the public lands of the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States and constituting only a pledge of a grant in future or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys,
21 or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be delivered from their appropriation to the estate.

In Cooper *vs.* Roberts, 18 How., 173, the court said:

We agree that until the survey of the township and the designation of the specific section the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant; but when the political authorities have performed this duty, the

compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

Fletcher *vs.* Peck, 6 Cranch, 127; McGehee *vs.* Mathis, 4 Wall., 145; Mayor of New Orleans *vs.* Dearmas, 9 Pet., 224.

These decisions cover this case. In the Wisconsin case the land was Indian land, set apart for the use of the Indians, as these lands in Kansas were set apart to the use of the Osage Indians. In each case the title was in the Government; the right of possession in the Indians. In each case the Government by compact with the State, by the act of admission, gave the State in one case the sixteenth sections and in the other the sixteenth and thirty-sixth sections, this compact having been recognized in Wisconsin and Michigan and elsewhere as attaching to all the lands in the State in which the Government had not parted with its title, and embraces all Indian lands, and when the Indian title is extinguished the lands pass to the State under this compact.

It is claimed, however, by the defendants in error that, admitting the authority above cited to be correct, yet it is not applicable, for the reason that the acts of admission of the States of Wisconsin and Michigan are different from the act of admission of Kansas, and that the proviso to section one of the act of admission of this State
22 places a limitation upon the State to claim these lands. Section one of the act of admission reads:

That the State of Kansas shall be, and is hereby, declared to be one of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatever, and the said State shall consist of all the territory included within the following boundaries (here follows the boundaries); provided, that nothing contained in said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with such Indian tribe is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or Territory, but all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas until such tribe shall signify their assent to the President of the United States to be included within said State, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise which it would have been competent to make if this act had never passed.

To say that this proviso is clear and that there can be no doubt as to what Congress intended by it would be to claim too much. The subject of this section was one of boundary and of jurisdiction, and these provisions were in relation to the boundary of the State and excepting from its boundary and excepting from its jurisdiction, and not for the purpose, we think, of fixing or determining the grants to the State or limiting such grants. The next section following this provides in terms that no assent was given by Congress to

any of the propositions contained in the constitution submitted to Congress, but that Congress submitted in the act a proposition to the State, and these were specifically set out and numbered, and when adopted by the State were to be obligatory upon the United States as well as upon the State, and the first of these propositions was the one under which this land was ceded to the State as school land and to which the only condition attached was that it was
23 not to apply to land that had been sold or disposed of by the Government. This could mean nothing less than passing to the State all the title the Government had to its land of the sixteenth and thirty-sixth sections within the boundaries set out in section one. At that time a large part of the territory of the State was claimed by the Indians, and that Congress intended by this proviso to exclude from the State the sixteenth and thirty-sixth sections of the lands when the Indian title became extinguished would have been a great injustice and in opposition to the acknowledged policy of the Government in the admission of new States in extending aid for school purposes, and such a construction of this organic act will not be given that would violate and set aside the policy and custom of the Government in dealing with new States.

But it is claimed by the defendants in error that, considering this land to be school land, then they were granted the right of way by the legislature of the State of Kansas under chapter 79, Laws of 1864. This was an act accepting the grant of lands to the State made by Congress in aid of certain railways and telegraph lines. Section six is as follows:

The right of way upon and across all lands belonging to the State, to a distance of one hundred feet in width, together with the right to construct and use upon such lands all turnouts and water stations, is hereby granted to said companies, respectively, for the use of their respective roads.

At this time there was no road located on land designated by the defendants, and this title, whatever else it may have been, was a present grant to the railroad companies and not a continuing or future grant; it could have no operation until the title and right of possession of the Indians was extinguished, which was
24 not until January 21, 1867, when the treaty was ratified.

The next claim by the defendants is under chapter 44 of the Session Laws of 1865, and under section ten of that act. That was an act to provide for the incorporation and regulation of railway companies, under which defendant companies were organized and the road constructed. Section ten is as follows:

SEC. 10. Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line and may appropriate thereof, as may be deemed necessary for its railroads, including necessary side tracks, depots and workshops, and water stations, matérial for construction, except timber, a right of way over adjacent lands sufficient to enable such companies to construct and repair its roads, and a right to conduct water by aqueducts, and the right of making proper drains, etc.

This statute is broad enough to give railway companies a con-

tinuing grant, and would give them the right to a right of way over the lands of the State, as far as the State could convey such right by act of the legislature, *in futuro*, and is broad enough to include lands acquired years after its passage and before the construction of the road; but as to this act, as well as to the act of 1864, there is one objection which we deem conclusive: These statutes were all repealed by section two, chapter 119, of the General Statutes of 1868, and, as the defendants' road was not laid out, located, or constructed until 1870, *and* until that time they could acquire no right by reason of these grants, when these statutes had ceased to exist and had no operation. Sec. 2 of chap. 119 is as follows: "All acts of a general nature embodied or re-enacted, in whole or in part, in any of the statutes hereinbefore enumerated or repugnant thereto are hereby repealed." This law of 1868 was a general law relating to the organization and operation of railroads. The act provided for right of way upon State lands and the manner in which
25 roads could purchase right of way and appropriate private lands. Articles 6 and 9 of chap. 23 of the General Statutes of 1868 treated of the same subject and covered the same general ground as that of chap. 44, under which the defendants claim a continuing grant and right of way, and as the statute of 1868 was upon this same general subject, making ample provisions for the appropriation of lands by the exercise of eminent domain by railroad companies, the clause above quoted repeals the entire chapter under which defendants claim.

The next claim of the defendants is under chap. 124, Laws of 1871. This was an act in relation to the Missouri, Kansas & Texas Railway Company and the Union Pacific Railway Company, Southern branch, which act purports to convey and extend to these companies all the rights they then possessed to any part of their line of road to their entire road, and was an attempt in this manner to give the defendants a right of way over all lands as fully as that enjoyed over other lands under other acts of the legislature, and was clearly in violation of section 1, art. 12, of the constitution, which provides that the legislature shall pass no special act conferring corporate powers. This was a special act of the legislature for the benefit of the defendant companies, giving them special rights and powers which under the constitution the legislature was prohibited from doing.

Beyond what we have said so far in relation to this act of the legislature of the State of Kansas under which the defendants claim title to this land, this much may be said: While we feel it not necessary to decide this question, yet, as this question is indirectly involved, and were it not for the fact that the acts under
26 which the defendants claim right of possession were repealed by the statute of 1868, would, we think, then be the controlling question which would determine the defendants' rights, and that is, Can the State give away the lands ceded by the Government to it for school purposes to railway companies or others without compensation therefor? This land is held by the State in trust for the schools of the State, and it is a sacred trust imposed upon the

State and should not be disregarded. Sec. 5 of the constitution of Kansas is as follows: "The school lands shall not be sold unless such sale shall be authorized by a vote of the people at a general election, but, subject to revaluation every five years, they may be leased for any number of years, not exceeding twenty-five, at a rate established by law." And the constitution, sec. 3, in speaking of the proceeds of the sale of school lands and other property belonging to the school fund, says: "Shall not be diminished, but the interest of which, together with all the rents of the lands and such other means as the legislature may provide by tax or otherwise, shall be inviolably appropriated to the support of common schools." Now, the policy of this State has been to hold this trust sacred, and not only comply with the letter but the spirit of the constitution, and to protect inviolably the school funds, and to adopt the views of the defendants would be to set aside this construction and hold for naught the constitutional provisions and safeguards thrown around the school property and funds.

In the case of Cooper *vs.* Roberts, 18 How., 173, the Supreme Court, speaking of the grant of school lands in Michigan, said: "The grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith." If
27 the legislature can transfer a right of way over the school lands of the State without compensation, then it can convey the remaining lands belonging to the State granted for this purpose for other internal improvements. If it can change one acre, it can change sections; and if it can divert one acre from the legitimate use for which it was given to the State, then it can use all the remaining lands belonging to the school as it may see fit. It is true it may be necessary for railroads to cross school lands, and some provisions must be made and carried into effect by which the right of way can be procured, and this is essential to the development of the State, but this can be accomplished as it is accomplished in the case of private property. Land can be condemned by proper proceedings, like the lands belonging to other trusts and to private individuals, and when compensation is made for its value the railroads can have a right of way across it; but in this case they are seeking a right of way without making compensation, and this right is based upon a violation of the spirit and letter of the constitution.

This closes up the claim of title and right of possession by the defendants, save and except as to the fifteen years' statute of limitation. It is shown and conceded that defendants have been in peaceable possession of this land since June 6, 1870, and they insist that as they have been in possession of the land for more than fifteen years prior to the commencement of this action the plaintiff is barred. One fact seems to have escaped the notice of the defendants, and that is that the State owned this land until May 25, 1871, at which time it conveyed by patent to the plaintiff's grantor.
28 That no statute of limitation could run against the State is a fundamental doctrine. As against the Government or the State, no right can attach to land that will defeat the State or its

grantees. The defendants were upon this land without right and could have remained there indefinitely and the State would not have been concluded by such adverse possession; and when the State conveyed to the plaintiff's grantor it conveyed title free from any limitation by adverse possession, and, as fifteen years had not elapsed before the bringing of the action and after the issuing of the patent by the State, the defendants cannot claim to hold by adverse possession.

In conclusion, we think that the defendants obtained no right to a way across the land in question by virtue of the act of Congress or by either of the acts of the legislature set up by them, and it is therefore recommended that the judgment of the court below be reversed and the cause remanded for further proceedings.

29 And afterwards, on the 23rd day of January, 1890, there was filed in the office of the clerk of said court a motion for a rehearing of said cause, which is in words and figures as follows, to wit:

STATE OF KANSAS:

In the Supreme Court of said State.

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants in Error.

Motion for Rehearing.

Comes now the defendants in error and move the court to set aside its order and judgment reversing the above case and grant these defendants a rehearing therein for the reasons following, to wit:

I. Material questions of law which seem to have escaped the attention of the court in considering this case and which are decisive of this case in favor of the defendants in error.

II. Material questions of fact that seem to have escaped the attention of the court in considering this case and which are decisive of this case in favor of the defendants in error.

T. N. SEDGWICK,
Attorney for Defendants in Error.

30 And afterwards, on the 27th day of January, 1890, there was filed in the office of the clerk of said — the proof of the service of the notice of said motion, which is in words and figures as follows, to wit:

STATE OF KANSAS:

In the Supreme Court of said State.

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants in Error.

Notice of Motion.

To the above-named plaintiff in error or Case & Glasse, his attorneys of record:

You are hereby notified that the defendants in error have filed a motion in the supreme court for a rehearing of the above-entitled cause; a copy of the motion is hereto attached, marked Exhibit "A," and made a part hereof for reference, and that such motion will be heard by the supreme court on the 7th day of February, 1890, or as soon thereafter as counsel can be heard.

T. N. SEDGWICK,
Attorney for Defendants in Error.

Service of notice of the above motion accepted this 24th day of January, A. D. 1890.

CASE & GLASSE,
Attorneys for Plaintiff in Error.

31 And afterwards, on the 3rd day of April, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

B. D. ROBERTS, Plaintiff in Error,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, Defendants in Error.

Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered that the said motion be overruled.

32 And afterwards, on the 22nd day of April, 1890, there was filed in the office of the clerk of said court a petition for a writ of error, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
State of Kansas, }

To the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas:

Your petitioner, The Missouri, Kansas & Texas Railway Company, a citizen of Kansas, would respectfully represent that at the January term, A. D. 1890, of the said supreme court of the State of Kansas, in the suit of one B. D. Roberts, plaintiff, *vs.* The Missouri, Kansas & Texas Railway Company, petitioner herein, defendant, judgment was rendered against the defendant, and that said judgment is rendered by the court of final appellate jurisdiction within and for said State.

Your petitioner further states that the proceedings in said suit so had involved the validity of a certain act of Congress entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved July 26th, 1866. The defendant The Missouri, Kansas and Texas Railway Company, named in said act, claiming by virtue of said act of Congress, a right of way two hundred feet in width was granted it over those sections of land embraced within the Osage reservation known as sections sixteen and thirty-six or school sections, and the judgment of the supreme court was against the validity of said grant, as appears upon the certified record of said supreme court herewith exhibited.

Your petitioner prays that upon inspection of the record it
33 be granted a writ of error to the Supreme Court of the United States in said cause, in order that the error, if any, in the proceedings and judgment of said supreme court of Kansas may be corrected.

JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

34 And also on the 22nd day of April, 1890, there was filed in the office of the clerk of said court an appeal bond, which, with the approval thereof endorsed thereon, is in words and figures as follows, to wit:

Supreme Court of the United States.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
B. D. ROBERTS, Defendant in Error.

Know all men by these presents that we, C. S. Cross, H. C. Whitley, and William Martindale, are held and firmly bound unto the defendant in error, B. D. Roberts, in the sum of five hundred dollars, to be paid to the said B. D. Roberts; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and

severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this — day of April, 1890.

Whereas lately, at the January term, A. D. 1890, of the supreme court of Kansas, in a suit depending in said court between B. D. Roberts, plaintiff, and Missouri, Kansas & Texas Railway Company, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error to the said court to reverse the judgment — aforesaid suit, and the citation directed to the said plaintiff, citing and admonishing him to be and appear at the Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, therefore, the condition of this obligation is such that if the above-named The Missouri, Kansas & Texas Railway Com-
35 pany shall prosecute its said writ of error to effect and *and* answer all damages and costs if it so fail to make good its allegation of error, then this obligation to be void; otherwise to remain in full force and virtue.

C. S. CROSS. [SEAL.]
H. C. WHITLEY. [SEAL.]
W. MARTINDALE. [SEAL.]

Approved by me this 22nd day of April, 1890.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

36 THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
B. D. ROBERTS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Kansas, Greeting:

Because — the records and proceedings and also in the rendition of the judgment which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between B. D. Roberts and The Missouri, Kansas & Texas Railway Company, wherein was drawn in question the validity of an act of Congress entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," under and by virtue of which said act the said Missouri, Kansas & Texas Railway Company claim a right of way two hundred (200) feet wide through the Osage reservation, and the decision was that such act was invalid as a grant of a right of way to the said Missouri, Kansas & Texas Railway Company over those sections of land embraced within the said Osage reservation

known as sections sixteen and thirty-six or school sections, a manifest error hath happened, to the great damage of the said Missouri, Kansas & Texas Railway Company, as by its complaints
37 appears, we, being willing that the error, if any hath been, *to* be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record of proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this 22d day of April, in the year of our Lord one thousand eight hundred and ninety.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

G. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed and approved this 22d day of April, A. D. 1890.
ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

38 [Endorsed:] 4978. B. D. Roberts *vs.* M., K. & T. R'l'y Co. *et al.* Writ of error. Filed Apr. 22, 1890. C. J. Brown, clerk sup. court.

39 And afterwards, on the 29th day of April, 1890, there was filed in the office of the clerk of said court a citation in the above-entitled cause, which, with the proof of the service thereof on opposing parties endorsed thereon, is in words and figures as follows, to wit:

The United States of America to B. D. Roberts, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein The Missouri, Kansas & Texas Railway Company is plaintiff in error and B. D. Roberts is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 22nd day of April, 1890.
ALBERT H. HORTON.

Service of the within citation upon the undersigned is hereby acknowledged this 24th day of April, 1890.

CASE & GLASSE,
Attorneys for B. D. Roberts, Defendant in Error.

The Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* B. D. Roberts, defendant in error. Citation.

40 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause in the supreme court of the State of Kansas as the same remains on file and of record in my office.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 15th day of August, 1890.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 230.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

against

B. D. ROBERTS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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B. D. ROBERTS, DEFENDANT IN ERROR.

IN ERROR FROM SUPREME COURT OF KANSAS.

Statement.

This was an action of ejectment brought by B. D. Roberts, as plaintiff, in the district court of Labette county, Kansas, against The Missouri, Kansas and Texas Railway Company to recover possession of certain lands situated in section sixteen (16), township thirty-four (34), range twenty-one (21), in said Labette county, Kansas, and occupied by the said Missouri, Kansas and Texas Railway Company as a right of way.

The lands in question are a part of the Osage ceded lands. The Missouri, Kansas and Texas Railway Company claims title to the lands in controversy by virtue of an act of Congress entitled "An act granting lands to the State of Kansas

to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph Company from Fort Riley, Kansas, to Fort Smith, Arkansas" (Approved July 26, 1866).

The company built and constructed its road through the land in controversy prior to June 6, 1870, and ever since has continued to occupy the same as a right of way, and it likewise claims title by virtue of such continued adverse occupancy under claim of ownership for more than fifteen years prior to the commencement of this action.

The title under which Roberts claims is a patent from the State of Kansas dated May 25, 1871, and he denies the power of Congress to dispose of sections sixteen (16) and thirty-six (36) after the admission of the State into the Union, even though said sections are embraced within the limits of the Osage Indian reservation, and therefore that the railway company (plaintiff in error here) secured no right of way over sections sixteen (16) and thirty-six (36) of the Osage Indian reservation by virtue of said act of July 26, 1866.

The facts were all agreed upon and are fully set forth in the record. (See pages 6, 7, and 8 of the Record.)

Roberts claims that the State of Kansas acquired title to the land as school land prior to the company's title to its right of way.

Assignment of Errors.

1. The supreme court of Kansas erred in its construction of section 34 of the act of Congress of May 30, 1854, known as the organic act.

2. The supreme court erred in its construction of section 1 of the ordinance to the constitution of the State of Kansas.

3. The said supreme court erred in its construction of section 1 of the act of Congress of January 29, 1861, entitled "An act for the admission of Kansas into the Union."

4. The said supreme court erred in its construction of section 3 of the act of Congress of January 29, 1861, entitled "An act for the admission of Kansas into the Union."

5. The said supreme court erred in its construction of chapter 1 of the General Statutes of Kansas of 1889, entitled "Joint resolution of the legislature of the State of Kansas accepting terms imposed by Congress upon the admission of the State of Kansas into the Union."

6. The said supreme court erred in its construction of the relation each and all of these several acts bear to each other.

7. The said supreme court erred in reversing the judgment of the lower court and remanding the case for further proceedings.

8. The said supreme court erred in not affirming the judgment of the lower court in favor of defendant below (the plaintiff in error here).

9. The said supreme court erred in not holding that upon all the facts and the law applicable thereto the judgment rendered by the lower court in favor of the defendant below (plaintiff in error here) should be affirmed.

10. The said supreme court erred in not holding that the plaintiff (defendant in error here) was estopped upon the facts in the case from maintaining an action of ejectment for the land in controversy.

11. The said supreme court erred in holding that the plaintiff (defendant in error here) could maintain an action of ejectment for the land in controversy.

12. The said supreme court erred in holding that section 1 of the act of July 26, 1866, did not grant defendant below

(plaintiff in error here) a right of way over sections sixteen (16) and thirty-six (36) of the Osage Indian reservation and over the land in controversy.

13. The said supreme court erred in holding that Congress did not have the power to grant defendant below (plaintiff in error here) a right of way over sections sixteen (16) and thirty-six (36) of the Osage Indian reservation and over the land in controversy.

14. The said supreme court erred in holding that the State acquired any interest in sections sixteen (16) and thirty-six (36) of the Osage reserved lands and the land in controversy prior to the act of Congress of April 10, 1869.

15. The said supreme court erred in holding that the State had any interest in sections sixteen (16) and thirty-six (36) of the Osage Indian reserved lands and the land in controversy at the time of the passage by Congress of the act of July 26, 1866.

The various acts of Congress and treaties bearing on the questions at issue as well as the constitutional provisions and laws of the Territory and State of Kansas are set out in our argument.

ARGUMENT.

Kansas Had Not Acquired Title to the Land When the Land Grant to the Railroad Was Passed.

On May 30, 1854, Congress passed an act entitled "An act to organize the Territory of Kansas and Nebraska." Section thirty-four (34) of said act reads as follows:

"*And be it further enacted*, That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing

the same into market, sections numbered sixteen (16) and thirty-six (36) in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same."

The above is all that refers to sections sixteen (16) and thirty-six (36) of the lands which are reserved for the purpose of being applied to schools in the Territory created by the act and the States and Territories to be thereafter erected out of the same.

The object of the act was to provide a civil government, and not to make a grant of lands. If section thirty-four (34) above quoted amounts to a grant of sections sixteen (16) and thirty-six (36) of the lands to the Territory and the States and Territories to be hereafter erected out of the same, it could only be a grant of such lands as were public lands, and certainly could not embrace specific reservations, such as the land in controversy was at the time of the passage of the act, for it is a part of the general history of the country that the Osage Indians were at that time in possession of the land under a treaty made prior to the date of the act referred to, and that the land in question had been long prior thereto and was at the time of the passage of the act of May 30, 1854, reserved for the use of the Osage Indians by virtue of the treaty proclaimed December 30, 1825, and the treaty of March 2, 1839. This Court has so decided in Wilcox *vs.* Jackson, 13 Peters, 449, and L. L. and G. Railroad Company *vs.* United States, 92 United States, 733.

In the first case this Court says—

"That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it."

And in the last case the above language is quoted, and, continuing, this Court adds the following:

"It applies with more force to Indian than to military reservations. The latter are the absolute property of the Government. In the former other rights are vested. Congress cannot be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such purpose."

See also—
Spalding *vs.* Martin, 11 Wisconsin, 272.
Ruggles *vs.* Marsilliott, 19 Wisconsin, 179.

So that the contention that by virtue of the organic act referred to the land became the absolute property of the State is not tenable.

Prior to the admission of the State of Kansas into the Union and on July 26, 1859, a constitutional convention adopted the present constitution of the State, and on the first Tuesday of the October following the present constitution was ratified by the people of the State, and section one (1) of the ordinance of the constitution reads as follows:

"Sections numbered sixteen (16) and thirty-six (36) in each township in the State, *including Indian reservations and trust lands*, shall be granted to the State for the exclusive use of common schools; and when either of said sections or any part thereof has been disposed of other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefor."

The language of this section clearly indicates that the State laid claim to sections sixteen (16) and thirty-six (36) in each township in the State, "including Indian reservations and trust lands," and sought to obtain a grant from the United States to such lands for the exclusive use of the common schools within the State. On the 29th of January,

1861, Congress passed an act for the admission of Kansas into the Union.

We find in section one (1) of said act, after defining the boundaries of the State, the following provision is inserted:

* * * "*Provided*, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas until said tribe shall signify their assent to the President of the United States to be included within said State or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed."

By this proviso Congress reserved to the General Government the right to make all needful and necessary regulations for the government of the Indians and also respecting their lands, property, or other rights by treaty, law, or otherwise. The Osage reservation, of which the land in controversy constituted a part, by this very provision in section one (1) of the act of admission became no part of the State of Kansas, but was entirely outside the boundaries of the State and consequently the State could not take title to the land or get any right to lands that were lying entirely outside of its boundaries. The Indians were in possession of the land and their rights to the land, whatever they were, had not been extinguished by treaty between the United States and said Indians at the time of the admission of the State of Kansas into the Union, nor had such rights been extinguished by treaty, law, or otherwise at the time of the

grant of a right of way contained in section one (1) of the act of July 26th, 1866, under which the plaintiff in error claims the land in controversy in this suit. This same proviso is found in section nineteen (19) of the act of May 30th, 1854. So that the Osage Indian reservation was never within the boundaries of the Territory of Kansas nor a part of said Territory.

But Congress fully intended to leave nothing to inference or construction, and that the demands or claims of the State, as indicated and made by it in section 1 of the ordinance of the Constitution, should be declined and not acceded to or acquiesced in by the General Government, and therefore expresses its further refusal to accede to the said demands or claims of the State of Kansas in section 3 of said act of admission, as follows:

"*And be it further enacted*, That nothing in this act shall be construed as an assent by Congress to all or any of the propositions or claims contained in the ordinance of said constitution of the people of Kansas or in the resolutions thereto attached; *but the following propositions are hereby offered to the people of Kansas for their free acceptance or rejection*, which, if accepted, shall be obligatory on the United States and upon the said State of Kansas, to wit:"

Which the court will observe is a direct refusal on the part of Congress to accede to any of the claims contained in section 1 of the ordinance of the constitution of the State of Kansas or in the resolutions thereto attached. Then Congress proceeded in this same section 3 of the act of admission to make to the people of Kansas certain propositions for their free acceptance or rejection, which, if accepted, should be obligatory upon the United States and upon the State of Kansas. The first proposition reads as follows:

"That section numbered sixteen and thirty-six in every township of *public lands* in said State and where either of said sections or any part thereof has been sold or otherwise

been disposed of, other lands equivalent thereto and as contiguous thereto as may be shall be granted to said State for the use of schools."

Now, the distinction will be readily seen that in the proposition above quoted Congress does not use the words "Indian reservations and trust lands," and limits the grant of lands to the State to each section sixteen and thirty-six of the *public lands*. It is well settled that an Indian reservation or a military reservation of land, made by the General Government, is not included in the term "public lands," and lands embraced within the reservation are thereby segregated from the mass of public lands, and consequently the land in question being a part of an Indian reservation was not public land on the date of the admission of the State of Kansas into the Union, to wit, January 29th, 1861, nor was it public land at the time of the passage of the act of Congress of May 30th, 1854, entitled "An act to organize the Territory of Kansas and Nebraska."

Section 3 of the act of admission, to which we have referred, contains six distinct propositions. In proposition five we find a proviso as follows:

* * * "*Provided*, That the foregoing propositions hereinbefore offered are on the condition that the people of Kansas shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof."

By the above proviso of proposition five of section 3 of the act of admission, Congress requires the State of Kansas to provide by ordinance, irrevocable without the consent of the United States, that the State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary

for securing title in said soil to *bona fide* purchasers thereof, which, in effect, is a demand by Congress that the State shall recede from its claims made to sections sixteen and thirty-six of Indian reservations and trust lands, and to accept the proposition contained in section 3. As to what would have been the effect if the proposition had been rejected by the State it is unnecessary to discuss, for the reason that they were not rejected. The State complied with the act of Congress and it receded from its demands and claims, as fully appears by reference to the act of the Kansas legislature, now known as chapter 1 of the General Statutes of Kansas of 1889, being entitled "A joint resolution of the legislature of the State of Kansas accepting the terms imposed by Congress upon the admission of the State of Kansas into the Union," which reads as follows:

"That the propositions contained in the act of Congress entitled 'An act for the admission of Kansas into the Union,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable, without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title to said soil, to *bona fide* purchasers thereof; and no tax shall be imposed on lands belonging to the United States." (Approved January 20th, 1862.)

Now we have a full compliance with the proviso contained in proposition five of the act of admission, and beginning with section 34 of the organic act and ending with chapter 1 of the General Statutes of Kansas of 1889, accepting the terms and propositions extended by Congress in the act of admission and construing all these acts as we would construe an ordinary contract or other written instruments, can it be questioned that the State did not get sections sixteen and thirty-six of the Osage Indian reservation? By section 1 of the ordinance of the constitution the State makes

claim to these lands. There can be no uncertainty in this claim. By sections 1 and 3 of the act of admission Congress declines to accede to this claim, but by the first proposition in section 3 tenders the State sections sixteen and thirty-six of the public lands and leaves out all reference to "Indian reservations and trust lands," and expressly states in the act that Congress does not accede to the claims of the State of Kansas as expressed in the ordinance of the constitution of the State or the resolutions thereto appended; then asks the State to accept or reject its proposition. By the enactment of chapter 1 of the General Statutes of Kansas of 1889, the propositions extended or offered by Congress are accepted, and by the very terms of the acceptance the State agrees not to interfere with the primary disposal of the soil, within her limits, by the United States. No exception is made in the acceptance of the terms proposed by Congress and the terms and propositions are accepted as they are extended. The Osage reservation was not, at the time of the admission of the State into the Union, public land. Consequently, the State did not get the sections afterwards known as sixteen and thirty-six.

Now, the whole question resolves itself into this: Did Congress, in view of the acts to which we have herein made reference, have the right or the power, after the State was admitted into the Union, to grant over the Osage reservation a right of way to plaintiff in error? It is simply a question of the power of Congress over the Osage reservation after the State had been admitted into the Union. It seems to us that Congress, in sections one (1) and three (3) of the act of admission, expressly reserved to itself that power and control over the Osage reservation, as well as all other reservations within the State. Further, the State, by chapter one (1) of the Compiled Laws of the State of Kansas of 1889, accepted the propositions tendered by Congress in the sense in which they were tendered, and by that act conceded the right of the General Government to the primary

disposal of the soil. Again, the power of Congress to dispose of sections sixteen (16) and thirty-six (36) of the Indian reservation and trust lands is distinctly recognized in section one (1) of the ordinance of the constitution of the State wherein it says:

"And when either of said sections or any part thereof has been disposed of, other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefor."

Aside from the question whether the State actually receded from its claim made in section one (1) of the ordinance of the constitution, the assent of the people in coming into the Union as a State upon the terms proposed must now be regarded as binding the State.

State of Minnesota *vs.* Batcheller, 1 Wall., 109.

II.

The Railroad Company Acquired its Title to Right of Way First.

On July 26, 1866, Congress passed an act entitled:

"An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas."

In section one (1) of said act, in addition to the land grant, it is provided:

* * * "*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through said reserved lands, in which case the right of way,

two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And, provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

This grants a right of way two hundred feet in width through the reserved lands, and Congress must have had in mind the Osage reservation, which was situated on the south line of the State of Kansas, when it made this grant of right of way through the reserved lands, as it was the only reservation, except the Kaw reservation, which was located in the center of the State and on the direct line of the road. It must have been apparent to any one at all acquainted with the geography of the country that it was impossible to get to the south line of the State without passing through the Osage reservation, and Congress must have had in mind such reservation in making this grant. This proviso in section one (1) granting a right of way applies only to reserved lands, for by the terms of section six (6) we see that the right of way is also granted through the public lands. Section six (6) reads as follows:

"*And be it further enacted*, That the right of way through the *public lands* be, and the same is hereby, granted to the said Union Pacific Railroad Company, southern branch, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turn-tables, and water stations."

No exception is made of school sections in either of the above grants. As the land in question was a part of the Osage Indian reservation, it is unnecessary to argue whether Congress could grant a right of way over sections sixteen

(16) and thirty-six (36) of what was then public lands, or whether sections sixteen (16) and thirty-six (36) of all lands in the State to which the Indian title had been extinguished were or were not public lands. In this act Congress clearly recognizes the distinction between "public" and "reserved" lands, and a right of way is by it given the railway through both.

The land in question remained a part of the Osage reservation until January 21, 1867, on which date a treaty was concluded with the Indians and the Indian title and right of occupancy to the land was extinguished and the land ceded to the United States for the benefit of the Indians.

See latter part of article one (1) of the Osage treaty of January 21, 1867, which reads as follows:

* * * "Said lands shall be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms for cash as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands, but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale and the said sum of three hundred thousand dollars placed to the credit of said Indians the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

And article two (2), which reads as follows:

"The said tribe of Indians also hereby cede to the United States a tract of land twenty miles in width from north to south off the north side of the remainder of their present reservation and extending its entire length from east to west, which land is to be held in trust for said Indians and to be surveyed and sold for their benefit by the Secretary of the Interior, under such rules and regulations as he may from time to time prescribe, under the direction of the Com-

missioner of the General Land Office, as other lands are surveyed and sold. The proceeds of such sales as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians, and the interest thereon, at the rate of five per centum per annum, shall be expended annually for building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics, and for providing such necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances."

Therefore it is apparent that by the treaty between the United States and the Osage tribe of Indians, concluded January 21, 1867, the United States undertook to protect its grant to the railroad company through these reservations by the language used in the first section of the treaty which we have quoted above. It seems to us that no other conclusion can be drawn from the language. This Court decided in the case of L. L. & G. Railway Company *vs.* United States, and also in the case of M., K. & T. R'y Co. *vs.* United States, in the 92nd U. S., herein referred to, that the act of July 26, 1866, did not make a grant of lands through the Osage reservation to these companies or either of them, and it also held in the same cases that the language above referred to in section 1 of the Osage treaty did not refer to the land grant. That leaves but one subject to which it could refer, and that is the right of way granted to the railway companies by section 1 of said act of July 26, 1866.

That Congress had the power to grant a right of way over an Indian reservation was decided by the supreme court of Kansas in the case of Grintner *vs.* The Kansas Pacific R'y Co., 23 Kansas, 642, where Justice Horton, speaking for the court and speaking directly on the subject of the power of Congress to grant a right of way to the Leavenworth, Pawnee and Western Railway Company through the Delaware Indian reservation, uses this language:

"The act of Congress donating lands to aid in the construction of railroads in Kansas granted the right of way through reserved lands for these roads, and, while the Supreme Court of the United States has held that the act does not dispose of the Osage lands to the railroad companies, no one has yet, as we are aware, questioned the grant for the right of way through the ceded or reserved lands."

And this Court decided in the case of St. Joe & Denver City Railway Company *vs.* Baldwin, 103 United States, 426, that Congress had the power to grant the right of way to a railroad company over an Indian reservation; also in cases of L. L. & G. R'y Co. *vs.* United States, 92 United States, 733, and M., K. & T. R'y Co. *vs.* United States, 92 United States, 733.

In the last two cases the question of the right of way was brought to the attention of this Court after the decision was rendered upon motion presented by Mr. Phillips, one of the counsel, and the Court caused a supplemental decree to be entered at the foot of the opinion, which is as follows:

"Nothing in this decree of affirmance nor anything in the decree of the circuit court shall be construed to affect in any manner the right of way or what is appurtenant to it for the road of the appellant through the lands which are the subject of this suit. April 24th, 1876."

This quotation does not appear in the opinion as printed in the reports of the above cases, but does appear on the records of this Court as a supplemental decree, and it seems to us is a distinct recognition by this Court of the power of Congress to grant a right of way to a railroad company through the Osage reservation. There can be no doubt about the intention of Congress to do so by the act of July 26, 1866, and the effect was the title and right to occupy the land in controversy as a right of way vested in the defendant company (plaintiff in error here) immediately on the passage of the act—in other words, *in præsenti*—and vested in the company the right of way from the date of the pas-

sage of the act and not from the date of the location of the road.

Rutherford *vs.* Green's Heirs, 2 Wheat., 196.
Lessieur *vs.* Price, 12 Howard, 59.
Schulenberger *vs.* Harrimen, 21 Wallace, 44.
St. Joe & Denver City R'y Co. *vs.* Baldwin, 103 U. S., 497.
M., K. & T. R'y Co. *vs.* K. P. R'y Co., 97 U. S., 426.
L. L. & G. R'y Co. *vs.* U. S., 92 U. S., 733.
S. P. R. R. Co. *vs.* Dull, 22 Fed. Rep., 489.
Wilkinson *vs.* M. P. R. R. Co., 20 A. & E. R'y Cases, 320.
Rider *vs.* B. & M. R'y Co., 10 A. & E. R'y Cases, 688.

And all persons acquiring any portion of said land after date of the grant take the same subject to the right of way conferred by it for the proposed road.

Cent. Pac. R'y Co. *vs.* Dyer, 1 Sawyer, 540.

The fact that the land is part of section sixteen (16) makes no difference; the power of Congress is absolute until the title has passed and vested in the State.

State *vs.* Batcheller, 1 Wallace, 109.
Frisbie *vs.* Whitney, 9 Wallace, 107.
U. P. R'y Co. *vs.* Douglass County, 31 Fed. Rep., 540.
Coleman *vs.* St. Paul, M. & M. R'y Co., 36 N. W. Reporter, 638.

In the case of U. P. Railway Company *vs.* Douglass County, *supra*, the question of the right of Congress to grant the Union Pacific Railway Company a right of way over sections sixteen (16) and thirty-six (36) is decided by the learned circuit judge, and he holds that Congress had such power until title to these sections was actually vested in the State, and in effect holds that the title does not pass to the State until the lands are surveyed and designated. The case is ex-

actly in point, as will be apparent upon reading section sixteen (16) of the act of Congress of 1854, entitled "An act to organize the Territory of Kansas and Nebraska." (10 St. U. S., 283.)

Section sixteen (16) of that act reads as follows:

"That when the lands within the said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market, sections numbered sixteen (16) and thirty-six (36) in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories to be hereafter erected out of the same."

Afterwards Congress passed the act of July 1st, 1862 (12 Statutes at Large, 491), which was an act granting lands to the Union Pacific Railway Company, and section two (2) contained a provision as follows:

"That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad, * * * etc. * * *"

The act granting a right of way to the railroad company was subsequent to the organic act of the Territory, and it was insisted that the organic act contained a reservation of sections sixteen and thirty-six for school purposes, and that Congress did not, after the passage of the organic act, have the power to grant the Union Pacific Railway Company a right of way over the same, so this decision is directly in point upon the question in controversy.

The case of Coleman *vs.* St. Paul, M. & M. R'y Co., 36 N. W. Reporter, 638, presents exactly the same question upon exactly the same facts, and it was there held that Congress had the power to grant the railway company a right of way over sections sixteen and thirty-six, and it will be noticed

that the question in both of the preceding cases was as to the power of Congress over *public land*, and the holding is that Congress has the power to grant to a railway company a right of way over sections sixteen and thirty-six of the *public lands*, at least until the title to these sections has become vested in the State by a survey, and such survey must be prior to the act of Congress making the grant; then, if Congress has that power over public lands that are unsurveyed, it certainly has the same power over Indian reservations, because Indian reservations contain land to which the public have no right. Admitting, for the sake of argument only, that the grant to the State is a continuing one and attaches to all sections sixteen and thirty-six, when the Indian title thereto shall be extinguished and they become a part of the public lands, this is subject to the condition that no part of said lands has been disposed of when the grant attaches. When either of said sections or any part thereof has been sold, equivalent lands are granted to the State.

See first proposition in section 3 of the Act of Admission.

Section 1 of the Ordinance of the Constitution.

But the Osage land never did pass under the grant contained in the act of admission or the organic act, and the defendant in error here can claim nothing under these acts. By virtue of the treaty of January 21st, 1867, the Indians conveyed the lands to the United States in trust, only to be disposed of by the United States for the benefit of the Indians (see latter part of article 1 and article 2, Osage treaty of January 21st, 1867, 14 Statutes at Large). The effect of such a treaty upon the school lands was involved in the case of Ballou *vs.* Obrien, 20 Mich., 304, wherein Justice Cooley says:

"The treaty of 1837 transferred the Indian title to the United States, but in trust only, and the Government un-

dertook to sell the lands and account to the Indians for the proceeds. The treaty appears to have applied to the 16th sections as much as to any other. It is very clear, we think, that while this treaty remained in force the State acquired no rights to the several sections 16 which were surveyed under it."

At page 325, Campbell, J., says:

"In this case the treaty which extinguished the Indian title expressly appropriated these lands to a use inconsistent with any interest in the State. It cannot be a question that a treaty is the supreme law. The land was put in the hands of the Government upon a definite trust by the treaty of 1837, and when the survey was made it was to carry out that trust. The Government, as a trustee, could not lawfully have conveyed these sections to the State if it had been demanded, and the title was as distinct from the proprietary interest as if the trustee had been a citizen instead of a nation. The trust was hostile and paramount to any State claim, and the land was effectually disposed of within the meaning of the act of admission."

When the State of Kansas was admitted into the Union the General Government made no compact or agreement with the State to extinguish this Indian title or right of occupancy to the Osage ceded lands, and the Osage Indians could occupy them just as long as they pleased, and the State was powerless to interfere. The General Government was under no obligation to the State to ever extinguish the Indian title to their right of occupancy to these lands.

Ballou *vs.* O'Brien, 20th Mich., 320.
Wood *vs.* M., K. & T. R'y Co., 11th Ks., 323.

If the only claim the State had to these lands was by virtue of the organic act, section 1 of the ordinance of the Constitution and sections 1 and 3 of the act of admission, then we submit it had no interest in them; because, in the light of the above authorities and by the very terms of the act of admission, it only gets sections sixteen and thirty-six

of the public lands, and the land in question was not then public land. But the State gets the land by virtue of the act of Congress of April 10th, 1869, which granted to the State each section sixteen and thirty-six of the Osage ceded lands for the benefit of the common schools, and that portion of said section which is material to this question reads as follows:

"Act of April 10th, 1869. (No. 18.) A resolution enabling *bona fide* settlers to purchase certain lands acquired from the Great and Little Osage tribes of Indians: * * * Provided, however. That both the odd and even numbered sections of said lands shall be subject to settlement and sale as above provided; and provided further, that the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes in accordance with the provisions of the act of admission of the State of Kansas: *Provided, however, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties.*"

This act is found in the 16 Statutes at Large, page 55, and its passage is significant in this, that Congress did not consider that the State had any claims whatever to sections sixteen and thirty-six of the Osage ceded land by virtue of any existing law, and therefore the necessity for this act. This is the view taken by the supreme court of Kansas, as expressed by it in the case of Baker *vs.* Newland, 25 Kansas, 25.

On page 31 of the opinion the court, referring to the object and purposes of the above statute, say:

"A reasonable construction is that the sixteenth and thirty-sixth sections of these lands now belonging to the Government are granted just as the same numbered sections of other Government lands had been granted, by the act of admission. The accord is in the number of the sections and the purposes of the grant. In harmony with the spirit and intent of the act of admission, as well as the general purpose of Congress in respect to schools, it extends the grant of the act to lands not at that time fully within the

disposal of the Government. It is a grant in accord with the grant of the act, but is an actual grant, and not a mere recognition or confirmation of a doubted or disputed title."

And the court decides that by the act of admission the State got no part of these lands, and hence there was a necessity for the above act, and that the effect of the above act was to make a grant direct to the State of sections sixteen and thirty-six of the Osage ceded lands.

As to these school sections, no title vested in the State until the Indians ceded the lands to the United States or until the Indian title had been extinguished and the land surveyed:

Act of admission, sections 1 and 2.
Ballou *vs.* O'Brien, 20 Michigan, 304.
Water Company *vs.* Bugby, 96 U. S., 165.
Medley *vs.* Robertson, 55 California, 396.
Baker *vs.* Newland, 25 Kansas, 25.
Union Pac. R'y Co. *vs.* Douglass Co., 31 Fed., 540.

And when the Indian title and right of occupancy was extinguished this right of the State to sections sixteen and thirty-six did not vest by relation so as to defeat intervening rights:

Flint R'y Co. *vs.* Gordon, 41 Mich., 420.
See last proviso of the act of Congress of April 10th, 1869.

This proviso must have been intended to protect the right of way granted to certain railroads through these lands, and the decision of the supreme court of Kansas, from which we quoted above in the case of Baker *vs.* Newland, is certainly a concession that the State did not get sections sixteen and thirty-six except under and by virtue of the act of April 10th, 1869.

The defendant in error relies entirely upon the authority of Beecher *vs.* Wetherby, 95 U. S., 517.

We contend, first, that the facts upon which that decision is based are such that, when properly understood, the decision is not an authority in this case for the following reasons: The land in controversy in that case was a school section. It was a portion of the Menomonee Indian lands. It never had been directly reserved by the Government for an Indian reservation. On July 9th, 1832, a treaty between the United States and the Menomonee tribe of Indians was proclaimed, which treaty had been amended by resolution of Congress of June 25th, 1832, and it was proclaimed with the amendment. The second supplemental article of the treaty was an agreement to cede a body of land embracing the land in dispute in that case to the United States, and the provision to which we refer directly is as follows:

" * * * *Provided*, That for the purpose of establishing the rights of the New York Indians on a permanent and just footing the said treaty shall be ratified with the express understanding that two townships of land on the east side of Winnebago lake, equal to 46,080 acres, shall be laid off, and commencing at some point to be agreed upon, for the use of the Stockbridge and Munsee tribe, etc. * * *"

And in pursuance of that agreement the Menomonee Indians removed from the land, and the United States placed thereon the Stockbridge and Munsee Indians, a partially civilized tribe of New York Indians. Now, it will be observed that there are no treaty stipulations between the United States and the Stockbridge and Munsee Indians by which this particular land was reserved for them, and no treaty seems to have been made with the Stockbridge and Munsee tribes of Indians until September 3rd, 1839, when one-half of the lands referred to in the treaty of 1832 between the United States and the Menomonee Indians were released or ceded to the United States by the Stockbridge and Munsee Indians, for which they got a consideration.

The language of the treaty of September 3rd, 1839, is as follows:

"Article 1. The Stockbridge and Munsee tribes of Indians (formerly of New York) hereby cede and relinquish to the United States the east half of the tract of 46,080 acres which was laid off for their use on the east side of Lake Winnebago in pursuance of the treaty made by George B. Porter, commissioner on part of United States, and the Menomonee tribe of Indians, on the 27th day of October, 1832."

leaving but one-half of the land in the possession of the Stockbridge and Munsee Indians. On March 3, 1843, Congress passed an act by which the balance of the land was to be divided among members of the tribe, and their tribal existence should cease and determine (see 5 Statutes at Large, page 645). Section 7 of said act reads as follows:

"That the report and map shall be filed with the secretary of said Territory and in the clerk's office of said county, and shall be transmitted to the President on or before the first day of January, 1844; after the same shall have been filed and transmitted to the President, as aforesaid, the said Stockbridge tribe of Indians, and each and every one of them, shall then be deemed to be and from that time forth are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States and of the Territory of Wisconsin in the same manner as other citizens of said Territory, and the jurisdiction of the United States and of said Territory shall be extended over said township or reservation now held by them in the same manner as over other parts of said Territory; and their rights as a tribe or nation and their power of making or executing their own laws, usages, or customs, as such tribe, shall cease and determine: *Provided, however,* That nothing in this act contained shall be so construed as to deprive them of the right to any annuity now due them from the State of New York or the United States; but they shall be entitled to receive any such annuity in the same manner as through this act had not been passed."

Now, it seems that this statute was never carried out to its full extent, yet it fully appears that the tribal relation of the Indians was broken up and that the intercourse that they, as a tribe, had with the United States ceased, and they were treated as citizens of the United States to a certain extent, at least, and that is borne out by the fact that by treaty of March 1, 1849, it is provided that a portion of the Stockbridge tribe of Indians should be restored to the tribal condition upon the understanding that they remove to a new home. Now, all this, except the treaty restoring a portion of the Indians to their tribal condition, took place prior to the admission of Wisconsin into the Union as a State. Consequently the land was recognized by the General Government at the time of the admission of the State of Wisconsin into the Union as public land. It is true that after the admission of the State into the Union the Menomonee Indians ceded this land to the General Government with other land, but that tribe of Indians had not been occupying the land since the treaty of 1832, but it had been occupied by the Stockbridge and Munsee Indian tribes, and the only title the Indians could have to the soil was the right of occupancy. The Menomonee tribe, having removed from the land, certainly had no interest in it, and the only interest the Stockbridge and Munsee tribes had was the right to reside upon the land until, by act of March 3, 1843, they were permitted to take land in severalty or allotment and become citizens of the United States. Those Indians who availed themselves of the provisions of that act became citizens of the United States and got a portion of this land, but those of the tribe who desired to resume the tribal relations and remove to a new home got no land.

Now, it will appear by an examination of the various treaties and acts to which we have referred that the land was to all intents and purposes public land at the time, and that the United States had made no disposition of this land inconsistent with the grant to the State of Wisconsin. The

question of the power of Congress or the General Government to have made a disposition of this land inconsistent with the grant to the State is not raised in this case.

The State claimed the land by virtue of act of Congress of August 6, 1846, which provides:

"Section number sixteen in every township of the public lands in said State, and when such section has been sold or otherwise disposed of other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

The State accepted this provision, and the provision clearly recognizes the right of Congress or the General Government to dispose of section sixteen at any time before the title passes to the State, and the decision all the way through refers to the land as *public land*, and it certainly never had been reserved by the General Government from settlement and sale. For these reasons the case of Beecher *vs.* Wetherby is not in point. No such compact existed between the State of Wisconsin and the General Government, as we have shown herein, as existed between the State of Kansas and the General Government, and if it be contended that we are wrong in our conclusions, and that the case of Beecher *vs.* Wetherby is an authority, then we wish to say that we do not consider the decision sound; that it is not a clear exposition of the law. But we think it is unnecessary to attack the soundness of the decision, for we believe it is sound when considered in the light of the facts upon which it is based. But, as we consider the treaties and various acts of Congress bearing upon this question, the land in question was public land at the time of the admission of the State of Wisconsin into the Union. That the United States can dispose of the fee of an Indian reservation and at the same time protect the Indians entitled thereto in the right of occupancy we do not question, but such fact must clearly appear. It must be shown that such was the intention of Congress,

while in this case everything goes to show that Congress did not grant sections sixteen and thirty-six of the Osage Indian reservation to the State of Kansas until the act of April 10, 1869, and that it was so understood by Congress, so understood by the State of Kansas, and so understood by the supreme court of Kansas in the case of Baker *vs.* Newland, 25 Kansas, 25, to which we have referred.

III.

The Plaintiff is Estopped, Barred through Laches from Maintaining this Suit.

Prior to June 6, 1870, plaintiff in error, the railway company, constructed its road over the land in controversy. The land was at that time State land, but it became State land, as we have attempted to show, subject to the rights acquired by the Missouri, Kansas and Texas Railway Company under and by virtue of an act of Congress of July 26, 1866. The State, by permitting the railway company to enter upon the land and construct its railroad and operate the same without question, became estopped and could not maintain action of ejectment against the plaintiff in error for possession of the land.

Verdier *vs.* Port Royal Railway Company, 15 Schand, (S. C.), 476.

Same *vs.* Port Royal & Augusta Railway Company, 15 Schand (S. C.), 484.

But whether the State is estopped or not there can be no question but what its grantees are estopped and cannot maintain an action of ejectment for the land. The State, having permitted the railroad company to enter, would be confined to an action for damages against the company. This right does not run with the title to the land and is not

transferred by a deed which purports on its face to convey the title to the land.

A party buying land upon which a railroad is constructed and in operation takes the land in its present condition, and if damages have not been paid the right to maintain an action for damages does not pass from the owner by virtue of his deed, and the purchaser gets no right to maintain the action except by a special assignment, as a chose in action. Therefore the defendant in error, having purchased the land more than fifteen years after the railroad company had occupied the land in controversy as a common carrier, and the company, having erected and maintained during all of said time valuable and lasting improvements thereon, cannot by the action of ejectment dispossess the company.

Wood's Railway Law, 864.
Mills' Eminent Domain, 66.
Rorer on Railroads, 421.
McFadden *vs.* Johnson, 72 Pa. St., 335.

Stipulation 7, on page 7 of the printed Record of this case, shows that the railroad was constructed over the land in controversy prior to the 6th day of June, 1870. Stipulation 8 clearly shows that J. A. G. Roberts became a purchaser of the land from the State on the 25th of May, 1871, and took possession of the same, except that portion occupied by the railway company at the time he became purchaser from the State, and that he retained possession and control of said land, except as stated in stipulation No. 7, until September 7th, 1885, when he sold said land to the defendant in error, B. D. Roberts.

See stipulation 9, on page 7 of the printed Record.

B. D. Roberts took possession of the land by virtue of his deed from J. A. G. Roberts. Hence, the immediate grantor of the defendant in error had acquiesced in the occupancy of the land by the railway company as a right of way from

the time of his purchase, May 25th, 1871, to September 7th, 1885, being something like fourteen years and four months, and that the immediate grantor of the defendant in error had acquiesced in the occupancy of the land by the railway company without objection or protest of any kind. From this fact we may well infer his consent to such occupancy. As a matter of fact, when the defendant in error became the owner of the land, the railway company had occupied it as a right of way for fifteen years and three months. This suit was commenced December 15th, 1885. (See page 3 of the printed Record.)

We desire in this connection, and in support of our proposition that the action of ejectment cannot now be maintained, to call attention to the case of Union Pacific Railway Company *vs.* Douglass Co., 31 Federal Rep., 540, where the learned circuit judge, when passing upon this question, says:

"This right of way through school sections has been accepted without challenge for twenty years. This indicates the general understanding and is significant."

But we insist that the defendant in error was barred of his right of action because his immediate grantor was barred, and in support of this claim call the attention of the court to subdivision 4 of section 16 of chapter 80 of the General Statutes of Kansas of 1889, which is as follows:

"An action for the recovery of real property, not hereinbefore provided for, within fifteen years."

This is the longest period given within which to bring an action to recover real property in Kansas. See also the following authorities:

Atlantic & Gulf Railway Company *vs.* Fuller, 48 Georgia, 423.

Mills' Eminent Domain, sections 141–'2–'3.

McCauley *vs.* Western R. R. Co., 33 Vt., 311.

Goodin *vs.* Canal Company, 18 Ohio St., 169.
Traphagen *vs.* Jersey City, 29 N. J. E., 206.
Sabin *vs.* Vermont Central R'y Co., 25 Vermont, 363.
Wood's Railway Law, vol. 2, pp. 786–792.
Missouri Pacific Railway Co. *vs.* Gano, 47 Kansas, 457.
Harlow *vs.* M. H. & O. R'y Co., 41 Michigan, 336.
Cooley's Constitutional Limitations, p. 562.
Baker *vs.* C., R. I. & P. R'y Co., 57 Missouri, 265.
Pettibone *vs.* L. C. M. R. R., 14 Wisconsin, 479.
Buchanan *vs.* L. C. & S. W. R. R., 71 Indiana, 265.
Pickart *vs.* Ridgefield & C. R. R., 25 N. J. E., 316.
Attorney General *vs.* N. Y. & Branch R. R., 24 N. J. E., 49.

The company having occupied the land for over fifteen years prior to the commencement of this action, ejectment cannot now be maintained because the consent of the grantors of the defendant in error is presumed.

I. N. B. & W. R. R. *vs.* McBrown, 15 N. E. Rep., 831.

Another reason why the plaintiff below (defendant in error here) is estopped from bringing his action of ejectment against the plaintiff in error is that the plaintiff in error is a railway corporation engaged in interstate traffic with a line of road extending through the Indian Territory and through the States of Kansas and Missouri, which has been engaged in the business of a common carrier of interstate commerce ever since it was constructed across the land in controversy. This fact has been known to the plaintiff (defendant in error here) and his immediate grantors during all the time that the road has been in the possession of the land. It was known to each of them when they purchased the land, and the action of ejectment cannot be maintained without an interruption of those commercial relations existing between communities which are essential to their prosperity, nor can it be sustained without an interruption

of the duties of the defendant in its capacity as a common carrier of interstate traffic between the various communities through which it runs; because, therefore, of the inconvenience to the public, which has a right to insist upon the prompt performance by the carrier of its duties, the courts will seize upon very slight evidence to establish the consent of the land-owner to the entry and construction of the road by the carrier. If prompt action had been taken to prevent the construction of the road, or if, after construction, prompt action had been taken to either eject the company or secure damages, then no presumption of consent could be raised; but after the lapse of time, without objection, consent is certainly presumed. It is a general proposition of law, and one concerning which the Federal court is independent of the State law or the decisions of the State court, and will not feel itself bound in declaring the plaintiff (defendant in error here) estopped by the conduct of his grantors. The defendant in error could not complain of such decision against him, as it would be equitable and just to plaintiff in error and to the public whom the carrier serves.

All of which we respectfully submit.

JAMES HAGERMAN and
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

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No. 14,238.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

THE M., K. & T. RY. CO.,
Plaintiff in Error,

AGAINST

B. D. ROBERTS,
Defendant in Error.

Brief of Nelson Case, Attorney for Defendant in Error.

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STATEMENT OF FACTS.

On May 30, 1854, the act of Congress was approved creating the territory of Kansas, the 34th section of which act provided that "Sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory."

10 U. S. St. at L. 277, 289.

The constitution of Kansas was adopted July 29, 1859, by Section 1 of the Ordinance to which, sections sixteen and thirty-six were asked to be granted to schools.

1 Gen. St Kas. 1889 p 59.

On Jan. 29, 1861, Kansas was admitted into the Union, with a provision in the act of admission submitting to the people for their acceptance or rejection several propositions, and among them one granting the sixteenth and thirty-sixth sections to the state for school purposes.

12 U. S St. at L. 127.
1 Gen. St. Ks. 1889 p 112.

On Jan. 20, 1862, the legislature of Kansas passed an act accepting the provisions contained in the act of admission.

1 Gen. St. Ks. 1889 p 119.

On July 26, 1866, Congress passed an act granting land to Kansas in aid of a railroad, under which plaintiff in error claims.

14 U. S. St. at L. 289.

On Sept. 29, 1865, a treaty was concluded with the Osage Indians for the land in controversy: this treaty was amended by the Senate June 26, 1866; this amendment was adopted by the Indians Sept. 21, 1866; this treaty as amended was proclaimed Jan. 21, 1867.

14 U. S. St. at L. 687.

The lands thus purchased from the Indians were surveyed, commencing in fall of 1865 and concluding in early spring of 1867.

On April 10, 1869, Congress passed a joint resolution providing for the sale of the Osage lands to actual settlers.

16 U. S. St. at L. 55.

On June 6, 1870, plaintiff in error located and built its road across the land in controversy.

7th of Agreed Facts: Printed record p 7

On May 25, 1871, the land in controversy, being a part

of section 16, of the Osage lands, was conveyed by the Governor of Kansas to the grantor of defendant in error.

8th of Agreed Facts; Printed record p 7

The land in controversy was a part of the Osage Ceded Lands, and a part of a school section.

This action was brought by defendant in error against plaintiff in error to eject it from said land. The decision of the Supreme Court of Kansas was in favor of defendant in error, and plaintiff in error seeks a reversal of that judgment.

I understand that all the claims made in the lower court on account of state statutes, are, of course, eliminated from the record here. The decision of the Supreme Court of Kansas being against the claim of plaintiff in error under such statutes, this court will consider those matters settled and will confine its attention solely to the questions arising under the federal statutes. This, as I think, reduces the matter before this court to but two questions, viz:

First, Was the tract in controversy a part of the land conveyed to the state for school purposes by virtue of the first clause of section 3 of the Act of Admission, and its acceptance by the state? If it was, then, being prior in point of time to the grant to the plaintiff in error, the latter takes nothing by its grant.

Second, Was the right of way claimed by plaintiff in error ever approved by the President?

I am compelled to prepare this brief without having seen the brief of counsel for plaintiff in error and therefore have no information as to what claims he will make in this court, or on what authorities he will rely, except as I gather it from the proceedings in the State Court.

ARGUMENT.

I.

On behalf of defendant in error I claim that by virtue of section 34 of the Organic Act creating the Territory of Kansas, and of the first clause of section 3 of the Act of Admission, which provides: "That sections numbered sixteen and thirty-six, in every township of public lands in said state, * * shall be granted to said state for the use of schools," and the acceptance of such grant by the state, by act approved Jan. 20, 1862, (Gen. St. Ks. 1889, p 119, par. 277,) the land in controversy became a part of the state school land, and from that time its disposition was beyond the power of Congress.

To this claim plaintiff in error objects because the land in controversy was, at the time of the admission of Kansas into the Union, a part of an Indian reservation, and was therefore not *public* lands, and consequently not conveyed by the law quoted.

I am saved from any extended discussion of this point by the decisions of this court. By act of Congress of July 2, 1864, 13 U. S. St. at L. 365 the Northern Pacific Railroad Co. was granted "every alternate section of *public land*" along its route. In *Buttz v. N. P. R. R. Co.*, 119 U. S. 55 this court held that said grant covered an Indian reservation held substantially as the Osages held the land in controversy. The fee was in the government. There was no law appropriating it to any other purpose. It was *public* land. The occupancy only was in the Indian tribe.

II.

Counsel for plaintiff in error also contend that we cannot invoke the protection of a grant of the land to the state for school purposes, because the land in controversy, as he says, was not at that time within the state, being excluded

from the state boundaries by virtue of the *proviso* of section 1 of the Act of Admission. That *proviso* is as follows:

"*Provided*, That nothing contained in the said constitution respecting the boundaries of said state shall be construed * * * to include any territory which, by *treaty with such indian tribe*, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory."

12 U. S. St. at L. p 127.
1 Gen. St. Ks. 1889, p 112 par. 262.

There is nothing in this objection. It will be noticed that in order to be excluded from the territorial limits of the state it must be so provided by *treaty* with such Indian tribe. It is well known that when Kansas was admitted into the Union there were a number of Indian tribes within the state, and with some of these the government had treaties providing that their reservations should not be included within the bounds of any state without their consent. Thus by treaty with the Shawnees, located in Johnson county, Kansas, at the time of the admission of the state into the Union, by article X of the treaty of Aug. 8, 1831, it is provided: "And the United States guarantee that said lands shall never be within the bounds of any state or territory."

7 U. S. St. at L. p 357.

Probably provisions of a similar nature were inserted in the treaties with other tribes, and it was to prevent the violation of such provisions that the proviso above quoted was inserted into the act admitting Kansas into the Union. But no such provision can be found in any treaty ever negotiated between the United States and the Osage Indians and therefore the statutory *proviso* has no application in this case.

This was directly decided by the U. S. District Court for Kansas, in a case where the same claim was made in

reference to the Kansas tribe of Indians that counsel make in this case for the Osages, and in overruling such claim Justice MILLER used this language:

"By this proviso all territory was excepted out of, and was not to be included within the state, which belonged to a tribe having such a treaty, * * And the converse of this proposition is inferable: * * All territory which was not covered by such treaties was included within the state, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly and exclusively."

U. S. v. Ward, 1 Woolworth's Cir. Ct. Rep 18.

Finding that the Kansas Indians had no such provision in their treaties, the court held their territory to be within the boundary and jurisdiction of the state. And so it must be held with reference to the Osages. This same doctrine was affirmed by this court in the case of *Langford vs. Monteith* 102 U. S. (12 Otto) 145. And a like decision was reached by the supreme court of Montana,

Bd of Coms. of Yellowstone Co. vs N. P. R. R. Co.
10 Mont. 414, s. c. 25, Pac. Rep 1058

III.

That the state took the title to the land in question for the support of common schools by virtue of its compact with the general government has been already fully settled in this court by a decision based on facts almost identical with those underlying the case at bar. The first proposition of sec. 7, ch. 89, 9 U. S. St. at L. 58, submitted to the people of Wisconsin for their acceptance preparatory to their admission into the Union is identical with the first proposition of sec. 3, ch. 20, 12 U. S. St. at L. 127, submitted to the people of Kansas for their acceptance on being admitted into the Union, except that, in Wisconsin only the sixteenth section was granted to the state for school purposes, while in Kansas the sixteenth and thirty-

sixth were granted for that purpose. In the Wisconsin case to which I shall refer, the claim was made that the state did not take title to the land in question by virtue of said compact because, at the time it was occupied by the Menomonee Tribe of Indians, and therefore was not *public* land, just as the claim is made by plaintiff in error in the case at bar that the land in controversy did not pass to the state by virtue of the compact referred to because it was, at the time, occupied by the Osage Indians, and therefore was not *public* land.

In the Wisconsin case the land in dispute was held by the Menomonees by as strong a title as the Osages held the land in controversy in the case at bar. The treaty of Feb. 8, 1831, with the Menomonee Indians, 7 U. S. St. at L. 342, after giving the boundaries declared that "The country described within the above boundaries, the Menomonees claim as the exclusive property of their tribe." Farther on they provide that "For the purpose of securing to *themselves and posterity* a comfortable home" on certain land they cede to the government other lands, thus showing an intention of a permanent occupancy. Again, the treaty contained this stipulation: "The following described tract of land, at present owned and occupied by the Menomonee Indians, shall be set apart, and designated for their future home, upon which their improvements as an agricultural people are to be made." (Then comes a description of the reservation, and this declaration of the object of the government:) "The above reservation being made to the Menomonee Indians for the purpose of weaning them from their wandering habits and attaching them to comfortable homes," &c. It was by this treaty that the Menomnees held the land at the time of the admission of Wisconsin into the Union.

If we now turn to the treaty with the Osages of June 2, 1825, 7 U. S. St. at L. 240, by which they occupied the land in controversy in this case at the date of the admission of Kansas into the Union, we shall find that they had no stronger title to their land than the Menomonies had to theirs. The grant to the Osages reads: "There shall be *reserved*, to, and for, the Great and Little Osage Tribes of Indians, aforesaid, so long as they may choose to *occupy* the same, the following described tract of land," and then follows a description of the reservation containing the land in controversy.

I have thus called attention to the *identity* of the congressional grants to the two states and also the *identity* of right of the two Indian tribes to the reservations held by them respectively in order that it may be the more readily seen that the decision to which I now refer is absolutely controlling in the case at bar.

In the Wisconsin case the plaintiff claimed by virtue of a patent issued subsequent to the grant to the state for school purposes, just as in this case at bar plaintiff in error claims under a grant subsequent to the grant to our state for school purposes, while in that case defendant claimed, as we do in this, under a patent from the state by virtue of its holding the title under the government grant in the compact with the State on its admission into the Union.

In giving the opinion of the court in that case Justice FIELD said:

"It was, therefore, an unalterable condition of the admission, obligatary upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered merely as promissory on the part of the United States, and constituting only a pledge of a grant in future,

or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of lands in Wisconsin could be construed to embrace them, although they were not specially excepted. All that that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State."

After quoting from a prior decision in respect to a similar grant in Michigan, the opinion continues:

"In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section, the title to the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation. The plaintiff contends that there had been a prior reservation of the land to the use of the Menomonee Tribe of Indians. * * But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, could take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of govern-

mental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. * * *

In the construction of grants supposed to embrace lands in the occupation of Indians, questions have arisen whether Congress intended to transfer the fee, or otherwise; but the power of the United States to make such transfer has in no instance been denied. In the present case there can hardly be a doubt that Congress intended to vest in the State the fee to section sixteen in every township, subject it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was, at the date of the compact, occupied by different tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barberous condition of the Indian tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, 'its ancient and honorable policy' of devoting the central section in every townsnip for the education of the people."

Beecher v. Wetherby, 95 U. S. (5 Otto) 517.

Nearly every word said in the opinion from which I have quoted could, with as much propriety, be said in giving the opinion in the case at bar.

In *Heydenfeldt v. The D., G. & S. Mining Co.*, 93 U.S. (3 Otto) 634, the court was called upon to construe two laws—the school land grant and also the law in reference to mining, and adopted the ordinary rule to give, if possible, a construction which would uphold both. I do not think in the light of the facts and circumstances the doctrine announced in this case conflicts with that declared in the case of Beecher v. Wetherby, but the latter (Beecher v. Wetherby) being the latest case is of controling force in

case of any conflict between the two. The principle laid down in Beecher v. Wetherby was recognized and adopted in the subsequent case of *Butts v. N. P. R. R. Co.*, 119 U. S. 55.

IV.

The compact between the general government and the State of Kansas, expressed in the propositions submitted to the State in section 3 of the Act of Admission, and their acceptance by the State amounted to a contract, binding alike on Congress and the State, and thereafter it was beyond the power of Congress, had it so desired, to grant said land to any other party.

In *Minnesota v. Batchelder*, 68 U. S. (1 Wall.) 109, the court recognizes a modification of the grant to the State for schools as made by Congress; but this was done on request of the territorial legislature, and before the acceptance of the school grant by the State.

In *U. P. Ry. Co. v. Douglass Co.*, 31 Fed. 540, the court held that the reservation of sections 16 and 36 for school, contained in the organic act, did not deprive Congress of the *power* to grant a right of way over those sections, and that, under the circumstances of that case, it was the intention of Congress to grant such right of way. But in the case at bar we are not relying on a *reservation*, but are claiming under a *grant*. It has not been held, and will not be held, that Congress can make a valid grant of something which it has previously granted away.

In *McGehee v. Mathis*, 71 U. S. (4 Wall.) 143, this court said:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constitutes a contract. All the elements of a contract meet in the transaction—competent parties, proper subject matter, sufficient consideration, and

consent of minds. The contract was binding upon the State and could not be violated by its legislation without infringement of the constitution."

In *Fletcher v. Peck*, 10 U. S, (6 Cranch) 87, Chief Justice MARSHALL, speaking for the court, said, on p. 137:

"A contract executed as well as one which is executory, contains obligations which are binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."

In discussing the principle of the case, before using the language I have quoted, the Chief Justice makes it as applicable to Congress as to a State legislature.

That same distinguished jurist, in the case of *The Mayor &c. of New Orleans vs. De Armas* 34 U. S (9 Peters) 224, said:

"It is a principle applicable to every grant that it cannot affect pre-existing titles."

And the court say in *The Mayor &c. of New Orleans vs. The United States*, 35 U. S. (10 Peters) 731:

"It would be a dangerous doctrine to consider the issuance of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive and cannot be controverted, but if the thing granted was not in the grantor no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previovsly granted, and the second grant has been held to be inoperative."

On this authority, and much more which might be cited, it follows that the title to the land in controversy having passed out of the United States and into the State of Kansas, prior to the pretended grant to plaintiff in error, the latter took nothing therein.

V.

It will be noticed by reference to the act under which plaintiff in error claims, (14 U. S. St. at L. 289) that two provisions are made for right of way,—one, by sec. 6, absolutely, through the public lands through which the road was to pass, and, one, by the proviso to section 1, conditionally, upon its approval by the President, through *reserved* land. This act has heretofore been before this court for construction, and it has already been decided that the grant was one *in presenti*, and that plaintiff in error took no part of these reserved lands, as a grant.

L. L. & G. R. R. Co. v. U. S., 92 U. S. (2 Otto) 733
M. K. & T. Ry. Co. v. U. S., do 760.

Therefore, it can claim nothing by virtue of section 6. If it has a right of way through these Osage Lands, it is by virtue of the *proviso* of section 1. Before it can claim a right of way under the grant in that *proviso* it must show an approval by the President. Such an approval must of course be made at a time when the President had authority to make it, and that would be only while it was reserved land. There never was any such approval. The record is entirely silent on that subject. The 12th Agreed Fact does not show such approval.

The treaty with the Osages was proclaimed January 21, 1867; it ceased then to be *reserved* land. The government survey and sectionizing of the same was completed in the early spring of 1867. By the close of the next year nearly every quarter section was occupied by an actual settler. The joint resolution of Congress providing for its sale was approved April 10, 1869. Even plaintiff in error concedes that this land became school land by virtue of that resolution, if not before. Up to that time no interest of plaintiff in error had attached—its road had neither been constructed nor located: (7th and 12th stipulations of fact.)

The case of *The St. J. & D. C. R. R. Co. v. Baldwin*, 103 U. S., (13 Otto) 426 does not help plaintiff in error any, for in that case the company was claiming under section 6. The act under which that company was claiming is identical with the one under which plaintiff in error in this case claims, but in that case the road passed through no reservations and the company took the right of way, as it took the land grant, *in presenti*, without any approval of the President; all the reasoning of the court is based on that state of facts.

I submit that the claim of plaintiff in error cannot be upheld; *first*, because it has shown no approve of the President to the selection of its route at a time when he had a right to give it, and, *second*, for the better reason, that the land in controversy passed to the State as school land long before the passage of the act of Congress under which plaintiff in error claims. Therefore, the judgment of the Supreme Court of Kansas should be affirmed. All of which is respectfully submitted.

NELSON CASE,
Attorney for Defendant in Error.

OMISSION.—These references should appear at the close of subdivision I on page 11:

The construction of the swamp land grant is in harmony with the view I am here contending for.

Wright vs. Roseberry, 121 U. S. 488.
Tubbs vs. Wilhoit, 11 Sup. Ct. Rep. 279.

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. R'Y. CO.,)
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BERTS.) Term No. 230.

Supplemental Brief for Defendant in Error.

I do not know what counsel for plaintiff in error may say in his oral argument, but in reply to his printed brief which I have seen since filing my brief, I desire, by permission of the court, to make a few suggestions.

VI.

And, first, in respect to the argument of counsul for plaintiff in error that defendant in error is estopped from asserting his present claim, I call the court's attention to these points:

First. The first time plaintiff in error sought to raise this question was in his printed brief. Neither by pleading, nor evidence was the point raised in the trial court.

I call the court's attention to the allegations of the company's answer and its prayer for relief as found on page 5 of the printed record.

Second. Having failed to plead estopped, and resting the results of a trial wholly on other issues, he cannot now urge it for the first time in argument in this court.

"If a party has an opportunity to plead an estoppel and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury who are to find the truth."

Phil. W. & B. R. R. Co. vs. Howard, 54 U. S. (13 How.) 335.

Third. The question he now seeks to raise is one of state control, and therefore, must have been first raised in the state court, the decision of which would be followed by this court.

"Whether an equitable title could be set up in bar of the action at law * * to recover possession is a question of state law upon which the judgment of the state court is conclusive."

Chouteau vs. Gibson, 111 U. S. 200.

Fourth. But were this question properly before the court it could not be resolved in favor of plaintiff in error. The record is barren of a suggestion that defendant in error has done anything to mislead, or that plaintiff in error has in any way been either misled or injured by anything that

has transpired since defendant in error or his grantor had a right to speak.

"No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt."

R. R. Co. vs. Dubois, 79 U. S. (12 Wall) 64.

"For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel *in pais* is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character such as will prevent a party from asserting his legal rights to property, there must generally be some degree of terpitude in his conduct which has misled others to their injury."

Henshaw vs. Bissell, 85 U. S. (18 Wall) 271

To the same effect are

Brant vs. Va. Coal & Iron Co. 93 U. S. (3 Otto) 335, and Steel vs. Smelting Co., 106 U. S. (16 Otto) 456.

"An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

Ketchum vs. Duncan, 96 U. S. (6 Otto) 666.

I need not argue to this court that neither the state nor the general government is estopped from ejecting a tresspasser from the land who has gone there without the knowledge or consent of the government.

VII.

Again, counsel attempt to raise once more in this court the statute of limitations. That question was distinctly raised by its answer and squarely decided against plaintiff in error in the state court, as will appear in the opinion on page 20 of the printed record. It being a state law, and having been passed on by the highest court in the state, this court will, of course, follow that construction, or, rather, will say that it is not a question for decision in this court.

VIII.

In several places in his brief counsel refers to the case of U. P. Ry. Co. vs. Douglas Co., 31 Fed. 540. I want to again call the court's attention to the fact that in that case the circuit court was dealing with a *reservation;* in the case at bar the court is dealing with a *grant.* By the organic act creating Kansas Territory, as well as by the same act creating Nebraska Territory, the 16th and 36th sections

were *reserved* for schools. By the Act of Admission these sections were *granted*. Over *reserved* sections Congress had power to legislate; over *granted* sections its power had absolutely ceased.

Counsel have referred to a number of decisions in which some expression of the judge was given on a point not necessary for the determination of the case, which was not argued by counsel nor relied upon by anyone. It is needless to say that such expressions of opinion carry no great weight. And yet counsel would have the decision of this court turn on these dictum expressions.

IX.

Counsel argue that the reason for congress, in the Act of Admission refusing to accept the provisions contained in in the ordiance to the constitution was because the state had requested congress to grant the 16th and 36th sections in *Trust Lands and Indian Reservations* as well as in other lands. A glance at these documents will show that this was not the reason at all. The state, in its ordinance to the constitution, had made a number of requests, some of which congress was willing to grant as asked, some to grant in part, and some it rejected entirely. Some of the differences between what the state asked in the ordinance to the constitution and what congress proposed to give in the act of admission are the following: The state asked 36 sections for public buildings, congress granted 10 sections; the state asked 72 sections for the support of charitable institutions—congress granted none; the grant of salt springs, of the 5 per cent of the proceeds of the sale of public lands, of the 500,000 acres of land, are all modified from what the state had requested, while the grant of the 16th and 36th sections for common schools and 72 sections for a university was made as asked. The difference in the language used by the the framers of the state constitution from that used by congress in reference to the school grant is but incidental. The framers of the constitution were over cautious; congress with a larger experience used its customary language employed in making such grants. One was as broad in meaning as the other.

X.

In his brief filed in this court counsel for plaintiff in error for the first time raises the question of our right to maintain ejectment against a common carrier. I never understood before that a common carrier had a right to become a common trespasser. The pleadings are framed on the

basis of an ejectment action under the Kansas statutes. If the theory of plaintiff in error is correct, it should have demurred to our petition, because if, ejectment cannot be maintained against a common carrier then our petition did not state facts sufficient to constitute a cause of action. But instead of demurring plaintiff in error filed the answer contemplated by our statute in an ejectment case and joined with us in his prayer for relief, asking that the respective claims of title of both parties might be adjudicated and determined. It seems to me that after this the court will hardly consider an argument that we chose the wrong form of action. But this is the customary action in Kansas against railroad companies as well as against individuals, and has been so considered by our supreme court.

In *Cohen vs. St. L., Ft. S. & W. R. R. Co., 34 Ks. 166* the court say:

"If the plaintiff really supposed that the railroad company was a mere naked tresspasser on his land, why did he not commence an action of ejectment to oust it from his premises?"

Not only is this the usual and appropriate remedy, but counsul for plaintiff in error knows very well it was our *only* remedy. If we cannot maintain this action then we are wholly without means of relief.

XI.

There is but one other matter to which I wish farther to refer. In commenting on the case of Beecher vs. Wetherby counsel is mistaken in saying that in Wisconsin there was no compact between the state and the general government. The propositions submitted by congress to the peole of Wisconsin, together with the conditions on which they were submitted, were identical with those submitted to the people of Kansas, with the exception they got but one section of school land in each township while we got two. Likewise the acceptance of these propositions and the conditions on which they were made was the same in each state.

I need not again point out that the Wisconsin land was held and occupied by the Indians substantially the same as was the Kansas land. I submit, therefore, that the case of Beecher vs. Wetherly, is not only applicable, but is absolutely controlling in this case.

I confidently submit that no reason has been shown why the judgment of the supreme court of Kansas should not be affirmed.

NELSON CASE,
Attorney for Defendant in Error.